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The Workmen's Compensation Law Journal

Reports of All Decisions Rendered in Compensation and Federal Employers' Liability Cases in the Federal Courts and in the State Appellate Courts

William Otis Badger, Jr., Editor
R. M. Chandor, Manager.

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The Workmen's Compensation Law Journal

Volume VI *July, 1920* *No. 1*

Reports of All Decisions Rendered in Compensation and Federal Employers' Liability Cases in the Federal Courts and in the State Appellate Courts.

DOMINGUEZ ET AL. v. PENDOIA. (Civ. 3280.)

(District Court of Appeal, First District, Division 2, California. Feb. 20, 1920. Hearing Denied by Supreme Court April 15, 1920.)

188 Pacific Reporter, 1025.

1. MASTER AND SERVANT—INJURIES TO EMPLOYEE WHILE TRANSPORTED TO WORK BY MASTER ARISE OUT OF EMPLOYMENT WITHIN COMPENSATION ACT.

Where employee was killed by being thrown from an automobile furnished by the master to transport the employees to the place of work, his injuries arose out of and in the course of employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

2. CONSTITUTIONAL LAW—JURY — MASTER AND SERVANT—COMPENSATION ACT NOT INVALID AS DEPRIVING COURTS OF JURISDICTION AND PARTIES OF RIGHT TO JURY.

Under Const. art. 20, § 17½, providing that no constitutional provision shall limit the Legislature's authority to confer on a commission power to carry out legislation for the welfare of employees, and section 21 as adopted in 1911, authorizing provision for settlement by arbitration, by a board, or by the courts, of disputes involving the liability of employers, the Workmen's Compensation Act is not unconstitutional either as depriving parties of their right to trial by jury, guaranteed by article 1, § 7, or as depriving courts of their jurisdiction.

(For other cases, see Constitutional Law, Dec. Dig. § 56; Jury, Dec. Dig. § 31[1]; Master and Servant, Dec. Dig. § 347.)

3. MASTER AND SERVANT—FAILURE TO GIVE NOTICE UNDER COMPENSATION ACT DOES NOT GIVE COURT JURISDICTION.

Though the failure to give notice of accident required by Workmen's Compensation Act, § 15, may deprive the Industrial Accident Commission of jurisdiction, such failure does not give the court jurisdiction of an action for damages.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Mary Dominguez and others against A. L. Pendoia. From an order sustaining demurrer to the complaint without leave to amend, plaintiffs appeal. Affirmed.

B. F. Thomas, of Santa Barbara, for appellants.

Carroll S. Bucher, of Salt Lake City, Utah, for respondent.

A. E. Graupner, of San Francisco, amicus curiæ on behalf of Industrial Accident Commission,

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LANGDON, P. J. This is an appeal from an order sustaining a demurrer to a complaint, without leave to amend. The action was brought by the widow and minor children of Alfredo Dominguez, deceased, to recover damages for the death of said deceased, alleged to have been caused by the negligence of the defendant. The complaint alleged that on the 4th day of February, 1918, the deceased was in the employ of the defendant, who was constructing a water reservoir for the city of Santa Barbara; that the defendant furnished transportation to his employes engaged in working on said reservoir to and from their homes in said city to said reservoir by means of a trunk automobile driven by an employe of the said defendant, which automobile had not any means by which one riding on said automobile, when driven rapidly over rough roads or roads having short turns, could prevent himself from being thrown from said automobile; that on the morning of the accident, while the deceased with other employes of the defendant was being transported in defendant's automobile from Santa Barbara to said reservoir to engage in work for the defendant on the reservoir, the driver of the automobile, willfully, negligently, and without proper care, drove said automobile at the rate of about 25 miles an hour around a very short and dangerous turn in the road to said reservoir, and the deceased and two other employes of the defendant were thrown from the automobile with great force and violence, whereby the deceased was instantly killed.

The defendant urged as ground of demurrer that the superior court of Santa Barbara, in which court the complaint was filed, was without jurisdiction of the said action, and that the Industrial Accident Commission of the state of California had sole and exclusive jurisdiction of the same.

[1] The first question to be disposed of upon the appeal is: Do the facts stated in the complaint bring the action within the provisions of the Workmen's Compensation, Insurance and Safety Act of this state (St. 1917, p. 831), so as to give the Industrial Accident Commission jurisdiction? We are of the opinion that they do. Where transportation is furnished by an employer, as an incident of the employment, to convey an employe to and from the place of employment, an injury suffered by the employe going or coming in the vehicle so furnished by the employer, and under the control of the employer, arises out of and is in the course of the employment within the meaning of the compensation act. In re Donovan, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778; Matter of Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554; Bradbury's Workmen's Compensation (3d Ed.) pp. 480-484, and cases there cited; Judson Mfg. Co. v. Industrial Acc. Com., 184 Pac. 1; Starr Piano Co. v. Industrial Accident Commission, 184 Pac. 860.

It is true the case of Ocean Accident & Guarantee Corp. v. Industrial Accident Commission, 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336, which was based upon the English decisions, contains the statement that an employe going to and from his place of employment is not rendering any service, and begins to render such service only when he arrives at his place of employment and proceeds to use some instrumentality provided by means of which he immediately places himself in a position to perform his tasks. But nowhere in that decision is the legal situation discussed which is presented when an employe, as a part of his contract of employment, is proceeding to his work in a conveyance furnished by his employer and driven by the employer's agent. The appellant argues that the ownership of the conveyance can have no bearing upon the question involved, and in this we disagree with counsel. The logical difference between a situation where the employe is proceeding to work in a conveyance or by a means used by the general public, and where he is proceeding to work by means of an instrumentality furnished to him as an employe, by his employer, is indicated in one of the English cases discussed in the Ocean Accident Case, supra (Leach v. Oakley Street & Co., 4 B. W. C. C. 91). In the quotation from this English case which is inserted in the Ocean Accident decision, it is indicated that, in order to recover under

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the Workmen's Compensation Act, it is necessary for the employe to have suffered his injury, not because of a danger to which he was exposed as a member of the general public, but by reason of a danger to which he was exposed as an employe in his particular employment. And it seems to us that this is not only the logical dividing line, but it is the dividing line contemplated by the very purpose of the compensation laws in their effort to place upon an industry the burdens of injuries directly due to the hazard incidental to the industry. In the present case, if deceased had been riding upon a public conveyance, although he was on his way to his work, he would have been subject to the same dangers as any other member of the general public, and if he suffered an accident it would be as a member of the general public and due to a risk which he, in common with other members of the public, ran. But when he enters a vehicle provided by his employer for the purpose of conducting him to the place of his employment, he enters that vehicle, not as a member of the public, but as employe of the defendant. In other words, the danger to which plaintiffs' decedent was exposed in riding in this automobile, alleged to have been unprotected, and without guards or rails, and driven by a negligent driver, was a danger to which he was exposed, not as a member of the public, but because, and only because he was an employe of the defendant. This danger was an incident to his employment; it arose out of his employment, and was within the scope thereof.

The Workmen's Compensation, Insurance and Safety Act gives the Industrial Accident Commission exclusive jurisdiction of actions arising out of injuries under the circumstances presented here, and the superior court of the county of Santa Barbara was without jurisdiction.

Appellant seeks to avoid the force of these facts by attacking the constitutionality of the Workmen's Compensation, Insurance and Safety Act. It is asserted that the act is unconstitutional because it divests an injured employe, or the representatives of a deceased employe, of the right of trial by jury in violation of section 7, art. 1, of the Constitution of this state; that the act is also unconstitutional because it deprives the superior courts of this state of the jurisdiction conferred upon them by section 5, art. 6, of the Constitution.

[2] While these precise points were not urged, apparently, in the case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, the court in that case commented upon the objection raised in other states that similar acts were unconstitutional because they deprived both employer and employe of the right to trial by jury, saying that this objection had no application to the law in this state, "for although our Constitution has always contained a provision securing the right of trial by jury (article 1, § 7), the Legislature is, as we have already pointed out, expressly authorized by section 21 of article 20 to provide for the settlement by arbitration, by a board, or by the courts, of disputes involving the liability of employers. This section, adopted in 1911, worked a repeal pro tanto, of any conflicting provision which may have been in force theretofore." The language above quoted, in connection with the language of sections 17½ and 21 of article 20 of the Constitution of California, is a complete answer to both contentions of the appellant upon this question.

[3] We may very briefly dispose of the only other point raised by the appellant, which is that as section 15 of the Workmen's Compensation Act provides that no claim to recover compensation under the act shall be maintained unless within 30 days after the occurrence of the injury notice in writing shall be served upon the employer, etc., and, as the complaint in this case does not allege that such notice was served, it does not appear that the Industrial Accident Commission had jurisdiction. Appellant argues that if, by reason of the omission of notice, the Industrial Accident Commission had no jurisdiction, then the superior court would acquire jurisdiction. In the first place, the requirement of written notice contained in section 15 is not absolute, and facts may appear which would make the written notice unnecessary to the jurisdiction of the Industrial Accident Commission under the express language of the section. But be that as it

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may, it is certain that even though the appellant had by her omissions forfeited her rights before the Industrial Accident Commission, that in itself could not confer jurisdiction upon another tribunal. Under the Workmen's Compensation Act, the Industrial Accident Commission is vested with exclusive jurisdiction of actions such as the one here under consideration, and no neglect or failure upon the part of the employe or his dependents to comply with any provisions of the act can vest the superior court with jurisdiction.

The judgment is affirmed.

We concur: Nourse, J.; Brittain, J.

NELSON v. LONDON GUARANTEE & ACCIDENT CO., LIMITED. (Civ. 3102.)

(District Court of Appeal, First District, Division 2, California. March 5, 1920.)

189 Pacific Reporter, 306.

MASTER AND SERVANT — COMPENSATION INSURER'S SETTLEMENT, BASED ON MISTAKE OF LAW AND FACT, HELD WITHOUT CONSIDERATION.

Settlement agreement of insurance carrier with dependent of deceased employee, that payment of a certain amount per week in accordance with the Workmen's Compensation Act should be made so long as required by that act, not being based on consideration of forbearance to sue, but on mutual mistake that the employee, though injured while engaged in interstate commerce, was within the scope of the act, was without consideration.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Josephine W. Nelson against the London Guarantee & Accident Company, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

A. D. Schaffer, of San Francisco (Anthony Podesta, of San Francisco, of counsel), for appellant.

Walter H. Linforth, of San Francisco, and Carroll S. Bucher, of Salt Lake City, Utah, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of defendant after an order of the trial court sustaining its demurer to plaintiff's complaint without leave to amend.

The allegations of the complaint are that on the 12th day of May, 1914, plaintiff's husband, during the course of his employment as a stevedore for the Matson Navigation Company, was killed while loading a vessel of that company in the port of San Francisco, that his average weekly wage at that time was $20, and that plaintiff was his sole dependent. It is also alleged:

That prior to that time the defendant had entered into an agreement with the Matson Navigation Company, promising to pay to the dependents of employes of that company all sums of money due under the "Workmen's Compensation, Insurance and Safety Act" arising out of personal

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injuries, including death, sustained by such employes in the course of their employment. That for a period of 20 weeks subsequent to May 12, 1914, defendant paid to plaintiff the sum of $13 a week, or a total of $260, and that on the 30th day of September, 1914, plaintiff and defendant entered into an agreement in writing respecting the further payment of compensation to plaintiff, and adjusting the amount and manner of payment thereof. That such agreement provided in part as follows:

"The payment of $13 each week in accordance with Workmen's Compensation, Insurance and Safety Act [Laws 1913, p. 279] will be made so long as required by said act."

That said agreement was approved by the Industrial Accident Commission of the state of California, and for a period of 139 weeks subsequent to the 30th day of September, 1914, defendant paid to plaintiff $13 per week, or a total sum of $1,807, and that on the 29th day of May, 1917, defendant notified plaintiff that it had abandoned and repudiated said agreement and that no further payments would be made thereunder. It is then alleged that the sum of $1,053 is still due under the agreement by reason of the terms of the Workmen's Compensation, Insurance and Safety Act, which called for the payment of three times the average annual earnings of the decedent, and demand was made for judgment in that amount.

Respondent justifies its repudiation of the agreement upon the ground that subsequent to its execution the Supreme Court of the United States ruled that the Industrial Accident Commission of the state had no jurisdiction over accidents occurring upon vessels engaged in interstate commerce in navigable waters. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. It is conceded that appellant's husband was employed in interstate commerce at the time of the injury. From this it is argued that no liability attached to the respondent for the payment of compensation under the Workmen's Compensation, Insurance and Safety Act of this state, and that therefore there was no consideration for the settlement agreement made in 1914. The purpose of the settlement agreement undoubtedly was to fix the amount of compensation to be paid on account of the accident and the time and manner of payment. It was not a settlement of any disputed claim or a compromise of a doubtful right, both parties at the time having assumed that the provisions of the Workmen's Compensation, Insurance and Safety Act applied to accidents of this nature, and that the liability of the respondent to pay was fixed by the terms of that act. The liability of the respondent was not disputed at that time, and the right of the appellant to receive compensation in accordance with the terms of the said act was not doubted until after the decision of the Supreme Court of the United States holding that the state commission had no jurisdiction over accidents of that nature.

But it appears from the allegations of the complaint that respondent never contracted to make any payments, except of such sums as the Matson Navigation Company might be obligated to pay under the Workmen's Compensation, Insurance and Safety Act. Under the decision of the United States Supreme Court in the Jensen Case, that company was not obligated to pay under the act for injuries to its employes sustained while engaged in interstate commerce; but its liability, if any, was a common-law liability only, which was not covered by respondent's insurance contract. Thus neither the appellant nor the Matson Navigation Company could have maintained an action on the insurance contract for compensation for such injury. The settlement agreement was therefore without consideration. It was in no sense a contract based on the consideration of forbearance to sue, but was based upon a mistake of both law and fact. City Street Improvement Co. v. Pearson, 185 Pac. 962.

For these reasons the judgment is affirmed.

We concur: Langdon, P. J.; Brittain, J.

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ADAMS & WESTLAKE CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13119.)

(Supreme Court of Illinois. April 21, 1920.)

127 Northeastern Reporter, 168.

MASTER AND SERVANT — INJURY WHILE VOLUNTARILY OPERATING FELLOW SERVANT'S MACHINE HELD NOT ONE "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where a punch-press hand stopped his press after the day's work, and, going to a similar machine of a fellow operator, who had gone out, attempted to operate it, sustaining an injury to his hand, the machine being unguarded unlike his own, the injury did not "arise out of employment," within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings for compensation for injuries under the Workmen's Compensation Act by Bernard Bassman, the employee, opposed by the Adams & Westlake Company, the employer. Compensation was awarded by the Industrial Commission, the award confirmed by the circuit court, and the employer brings error. Judgment of the circuit court reversed, and award of the Industrial Commission set aside.

Charles E. Selleck and George A. Bruegger, both of Chicago, for plaintiff in error.

A. H. Ranes and Corinne L. Rice, both of Chicago, for defendant in error.

THOMPSON, J. This writ of error is prosecuted by leave of court to review a judgment of the circuit court of Cook county affirming a decision of the Industrial Commission awarding to Bernard Bassman, defendant in error, compensation for injuries received while in the employ of the Adams & Westlake Company, plaintiff in error.

Bassman was employed by plaintiff in error as an experienced punch-press hand and had been working for it about two weeks before he was accidentally injured. He was 17 years of age. His compensation was determined by the number of pieces punched, with a guaranty of a minimum of 27 cents an hour if his piecework did not amount to that much. During his employment he had not turned out more than the minimum, so it was stipulated that his compensation was $14.58 a week—six nine-hour days at 27 cents an hour. The presses of plaintiff in error were equipped with automatic registers, which showed the number of pieces punched by each machine. Bassman was assigned to a press to stamp out cups for lantern tops. About 15 minutes before quitting time on the day of the accident, the register on his machine showed that he had stamped out 8,000 cups. He considered this a full day's work and stopped his press. Johnson, the operator of the machine immediately next to the one operated by Bassman, left his machine and went to the office. Bassman out of curiosity attempted to operate Johnson's machine, but at the first attempt his left hand was caught in the press and his fingers were cut off. The machines were similar, but the die used in the Johnson machine was different from the one used in the machine operated by Bassman. The machine of the latter was equipped with a guard which pro-

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tected the hand, but there was no such guard on the blanking die used in the Johnson machine. Bassman had not been directed to operate this machine and knew that he would receive no extra compensation for whatever work he did with it.

The only question presented by this record is whether the injury arose out of and in the course of Bassman's employment. Taking the evidence in its most favorable light, with all the reasonable inferences to be drawn therefrom, we think it clear, under the authorities, that an award in this case cannot stand. We discussed at length in Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764, the law on this question, and what we there said is controlling here. It is neither necessary nor advisable to repeat the discussion. We think it cannot be seriously contended that Bassman was doing the work to which he had been assigned or that his work called for the operation of the machine by which he was injured. Whether his attempt to operate the adjoining machine was out of idle curiosity or for some other reason, he was acting upon his own initiative and without the employer's knowledge or consent. Where a servant voluntarily and without direction from the master and without his acquiescence goes into hazardous work outside of his contract of hire, he puts himself beyond the protection of the master's implied undertaking and is not within the terms of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). An injury to an employe while engaged in a voluntary act not accepted by or known to his employer and outside the duties for which he is employed does not arise out of his employment. Mepham & Co. v. Industrial Com., 289 Ill. 484, 124 N. E. 540.

Unfortunate as this accident is, the law does not justify the award, and therefore the judgment of the circuit court must be reversed and the award of the Industrial Commission set aside.

Judgment reversed.

CENTRAL ILLINOIS PUBLIC SERVICE CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13093.)

(Supreme Court of Illinois. April 21, 1920.)

127 Northeastern Reporter, 80.

2. MASTER AND SERVANT—JURISDICTION OF CERTIORARI UNDER COMPENSATION ACT SPECIAL.

In reviewing on certiorari an award under the Workmen's Compensation Act by the Industrial Commission, the circuit courts exercise special jurisdiction conferred by the act, and they cannot maintain such proceeding by virtue of their general powers.

(For other cases, see Master and Servant, Dec. Dig. § 417[3].)

3. MASTER AND SERVANT — CERTIORARI UNDER COMPENSATION ACT MAINTAINABLE ONLY IN COUNTY WHERE DEFENDANTS OR ONE OF THEM RESIDE.

Under Workmen's Compensation Act, § 144, par. (f), cl. 1, only the circuit court of a county where some one of the parties defendant shall be found has jurisdiction to issue a writ of certiorari to review an award of the Industrial Commission, and a writ issued by a court of a county wherein none of the parties defendant reside is in excess of its jurisdiction.

(For other cases, see Master and Servant, Dec. Dig. § 417[3].)

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4. MASTER AND SERVANT — COURT WITHOUT JURISDICTION OF CERTIORARI UNDER COMPENSATION ACT MAY TRANSFER PROCEEDING TO PROPER COUNTY.

Though the circuit court of the county which issued a writ of certiorari to review an award of the Industrial Commission under Workmen's Compensation Act was without jurisdiction because none of the parties defendant resided in the county, the court having issued a writ may nevertheless under Venue Act, § 36, transfer the proceeding to a circuit court of the county wherein some one of the defendants resides and which has jurisdiction.

(For other cases, see Master and Servant, Dec. Dig. § 417[3].)

Carter and Farmer, JJ., dissenting.

Error to Circuit Court, Champaign County; Franklin H. Boggs, Judge.

The Industrial Commission having rendered an award under the Workmen's Compensation Act in favor of B. L. Kirk, administrator of Jesse Huddleston, against the Central Illinois Public Service Company, employer, the employer brought certiorari to the circuit court and, the writ being quashed, brings error. Reversed and remanded.

Vanse & Kiger, of Mattoon, for plaintiff in error.

Dobbins & Dobbins, of Champaign, and F. B. Leonard, Jr., of Metropolis, for defendants in error.

STONE, J. On August 10, 1918, the Industrial Commission of Illinois, at a hearing to review an award, entered its order affirming the award in favor of B. L. Kirk, administrator of the estate of Jesse Huddleston, deceased, whose death was the result of an injury arising in the course of his employment with the plaintiff in error. At the time of the injury both parties were working under the Workmen's Compensation Act of the State of Illinois. On August 26, 1918, the plaintiff in error filed with the clerk of the circuit court of Coles county a præcipe for a writ of certiorari directed to the Industrial Commission, returnable to the October term, 1918, of said court, and filed its bond in the sum fixed by the Industrial Commission, and the same was approved by the clerk as required by law. On the same day a writ of certiorari was mailed to the Industrial Commission and notice of the commencement of the certiorari proceedings and the return day of the writ was mailed to Kirk the administrator, in care of Dobbins & Dobbins, his attorneys, at their post office address at Champaign, in Champaign county, Ill. Kirk was appointed administrator by the county court of Coles county. He resides in Champaign county and filed with the Industrial Commission his request that all notice of proceedings in this cause be served personally or by registered mail upon B. L. Kirk, administrator of the estate of Jesse Huddleston, deceased, Champaign, Ill., and gave the names and address of his agents or attorneys as Dobbins & Dobbins, of Champaign. Dobbins & Dobbins, acting as attorneys for the defendant in error, wrote counsel for plaintiff in error that Kirk did not reside in or "may be found" in Coles county, and that they would take advantage of such want of jurisdiction of the circuit court of Coles county if an effort were made to have the case reviewed in that court. On October 15, 1918, Kirk, in person limiting his appearance, moved the circuit court of Coles county to dismiss the proceedings on the ground that under the statute the court had no jurisdiction for the reason that he was not a resident and could not be found in Coles county within the meaning of the statute. Thereupon, on October 28, 1918, the writ of certiorari thus issued was quashed. On November 4, 1918, plaintiff in error filed a motion to set aside the order quashing

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the writ of certiorari, which motion was granted on April 23, 1919. On May 3, 1919, plaintiff in error filed a cross-motion for change of venue to the circuit court of Champaign county, which was allowed. The court thereupon ordered that the cause be transferred to the circuit court of Champaign county, and that the clerk forthwith transmit a transcript of the proceedings had in Coles county, together with all orders made and entered therein and all papers filed in the cause, to the clerk of the circuit court of Champaign county, and that the plaintiff in error pay all costs accrued. On June 18, 1919, after the order thus transferring the cause to the circuit court of Champaign county had been filed, the defendant in error, limiting his appearance, entered his motion to quash the writ of certiorari, for the reason that no writ of certiorari was sued out of the circuit court of Champaign county within 20 days from the receipt of notice by plaintiff in error of the decision of the Industrial Commission, and for the further reason that the circuit court of Coles county never acquired jurisdiction, and that the circuit court of Champaign county was likewise without jurisdiction.

The question presented by the assignments of error in this case is whether or not the circuit court of Champaign county acquired jurisdiction of the parties and of the subject-matter.

[1] Plaintiff in error contends that the order of the circuit court of Coles county transferring the cause to the circuit court of Champaign county was a valid order, and that the latter court thereby had jurisdiction of the cause and should have decided it on its merits. The question involved here is not one arising on the merits, however, but is whether plaintiff in error is entitled to a hearing on the merits in the circuit court of Champaign county. Circuit courts are courts of general jurisdiction. A court of general jurisdiction may have conferred upon it by statute a special statutory jurisdiction not arising out of the common law, from which such court draws its general juirisdiction, nor exercised according to the course of the common law but which is outside the general jurisdiction of such court. In such case its jurisdiction is special, and its proceedings and judgments are treated as the judgments and proceedings of courts of special jurisdiction. Calkins v. Calkins, 229 Ill. 68, 82 N. E. 242. When a court is in the exercise of special jurisdiction, that jurisdiction is limited to the language of the act conferring it. That court has no powers from any other source.

[2] Plaintiff in error contends that, since the circuit courts of the state have jurisdiction of common-law writs of certiorari and of bills in chancery, the circuit court of Coles county for that reason had jurisdiction of the subject-matter in the case at bar and had jurisdiction to transfer the cause to Champaign county. Actions and remedies under the Workmen's Compensation Act were unknown at common law. The entire subject of compensation for injuries to employes is of statutory origin. All proceedings thereunder are purely statutory. The writ of certiorari in this class of cases is not to be confused with the common-law writ of certiorari. The powers of the court under such a writ as provided by this act are different from those under the common-law writ of certiorari and are limited to the powers and jurisdiction conferred by the act. The proceedings under this act, where the writ of certiorari has issued or suit in chancery been commenced, are not the same as in other similar suits, but are governed wholly by the statute in question. People v. McGoorty, 270 Ill. 610, 110 N. E. 791. The theory of the Workmen's Compensation Act is that the question of compensation for injuries of an employe shall be adjusted speedily through the Industrial Commission in so far as that is possible. Courts are called upon to assist only as to questions of law arising. The method of invoking the aid of the circuit court is prescribed by statute, as are the questions that can be raised and the orders the court may enter. The jurisdiction of the circuit court and the method of review

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being statutory, only such jurisdiction for review is granted and only such method of proceeding can be employed as are pointed out by the statute. Where, in a special statutory proceedings, one form of review is especially given, all other forms of review are excluded. Smith-Lohr Coal Co. v. Industrial Board, 279 Ill. 88, 116 N. E. 656; People v. McGoorty, supra.

[3] Clause 1 of paragraph (f) of section 19 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 144) reads as follows:

"The circuit court of the county where any of the parties defendant may be found shall by writ of certiorari to the Industrial Board have power to review all questions of law presented by such record. Such writ shall be issued by the clerk of such court upon præcipe. Service upon any member of the Industrial Board or the secretary thereof shall be service on the board, and service upon other parties in interest shall be by scire facias, or service may be made upon said board and other parties in interest by mailing notice of the commencement of the proceedings and the return day of the writ to the office of said board and the last known place of residence of the other parties in interest at least ten days before the return day of said writ. * * * Such suit by writ of certiorari or in chancery shall be commenced within twenty days of the receipt of notice of the decision of the board."

It is evident that the court upon which jurisdiction to hear a cause on writ of certiorari or bill in chancery has been conferred by said section of the act is "the circuit court of the county where any of the parties defendant may be found." This court has held in Louisville & Nashville Railroad Co. v. Industrial Board, 282 Ill. 136, 118 N. E. 483, that the Industrial Commission and members thereof are not parties in interest as the term is used in paragraph (f) of section 19 of the act, and that, before an order can be made reviewing the act of the Industrial Commission, the writ of certiorari must issue out of or the bill in chancery be commenced in the court of the county where one of the parties defendant may be found. The jurisdiction here being statutory, it was conferred only on those circuit courts selected by the Legislature. As the administrator of the deceased employe in this case lived in Champaign county and was to be found there, the only court having jurisdiction to issue the writ of certiorari was the circuit court of Champaign county. It follows that the circuit court of Coles county did not have jurisdiction either of the person of the administrator or the subject-matter of the suit.

[4] Defendant in error contends that because this is so the circuit court of Coles county had no authority to make an order transferring the cause to Champaign county. Plaintiff in error, on the other hand, contends that jurisdiction to transfer the cause is conferred by paragraph 36 of the Venue Act, and that such is true even though the circuit court of Coles county had no jurisdiction of the parties or of the subject-matter for any other purpose. This brings us to a consideration of said paragraph, which is itself an act entitled "An act in relation to the practice in the courts of record in this state," in force July 1, 1891 (Hurd's Stat. 1917, p. 2957, c. 146), and is as follows:

"That wherever any suit or proceeding shall hereafter be commenced, in any court of record in this state, and it shall appear to the court where the same is pending, that the same has been commenced in the wrong court or county, then upon motion of either or any of the parties to such suit or proceeding, the court shall change the venue of such suit or proceeding to the proper court or county, and the same when the venue shall be so changed, shall be then pending and triable in such court or county to which the same shall be so changed the same as in other cases of change of venue."

Defendant in error contends that this act does not apply to cases where the court in which a suit is commenced does not have jurisdiction of the subject-matter. The construction of this act has not been hereto-

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fore before this court. It is evident, however, that by the use of the words "any suit or proceeding" the Legislature intended to include all actions or proceedings, whether the same be at law or in chancery or purely statutory, commenced in courts of record, and as such it cannot be doubted that the proceedings in the present case must be included. Furthermore, it is evident that by the use of the term "commenced in the wrong court or county," the Legislature intended to reach those cases begun in courts not having jurisdiction of the subject-matter as well as those where jurisdiction of the parties, alone, is lacking. This is a provision of the law evidently enacted for the purpose of simplifying procedure and preventing the loss of substantial rights through a misunderstanding as to what forum should be used to obtain such rights. By this act it is evident that the Legislature intended to and did confer on all courts of record in this state, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, jurisdiction to "change the venue of such suit or proceeding to the proper court or county." It cannot be doubted that the power to confer that limited jurisdiction lies within the powers of the Legislature, and we are of the opinion that in the instant case, while the circuit court of Coles county had no jurisdiction of the subject-matter involved for any other purpose than that defined in the Venue Act of 1891 and could therefore enter no order affecting the rights of the parties under the award made, that court was by said act empowered to transfer the cause to the proper county, which in this case was Champaign county, and under said act when said transfer was made the cause was from that time forward pending in the circuit court of Champaign county. The act further provides that when the venue shall be so changed the cause shall then be pending and triable in such court or county to which it shall be so changed, "the same as in other cases of change of venue." By section 16 of the Venue Act it is provided that, where a change of venue has been had, the clerk of the court to which the change of venue is granted shall file the transcript and papers transmitted to him and docket the cause, and such cause shall be proceeded in and determined in all things, as well before as after judgment, as if it had originated in such court." We are of the opinion, therefore, that the proceedings in this case were properly transferred to the circuit court of Champaign county and that that court should have proceeded to a hearing on the merits.

There is no question here as to the merits of the case. The only question here is one of jurisdiction of the circuit court of Champaign county to hear the case on its merits. There has been no hearing in that court on the merits and no judgment or order of that court concerning the merits is here for review.

For error in quashing the writ the judgment of the circuit court is reversed and the cause remanded for further proceedings not inconsistent with the views expressed herein.

Reversed and remanded.

CARTER and FARMER, JJ. (dissenting). We think this case should be affirmed on the merits, following the opinion of this court in Central Illinois Public Service Co. v. Industrial Com., 291 Ill. 256, 126 N. E. 144. It was conceded by all counsel that this case must be controlled on the merits by our decision in that case. The man whose case was being considered in that case and the man in this case were employed by the same company, were killed in the same accident, under the same circumstances, and their bodies were found close together. The only purpose there can be in sending this case back to the trial court is in order that such court may enter a proper order on the merits, and that order on the merits can only be one way. This opinion rightly says that the theory of the Workmen's Compensation Law is to dispose of the claims thereunder as speedily as possible. The delay necessarily caused by sending this case

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back to the trial court, it seems to us, is not in accordance with justice. To adhere to the conclusion reached here seems to us, in view of our former ruling as to an accident identical in every respect with this one, to be paying more attention to form than to substance. We appreciate fully that we should have an orderly procedure in these matters as in all others, and if the court thinks this question of procedure important enough to express its views thereon we could see no objection to so doing, provided the case was affirmed in this court on the merits under the ruling in Central Illinois Public Service Co. v. Industrial Com., supra. We think it would be entirely proper practice here to take the short cut by affirming the judgment on the merits, and thus saving all further delay and the additional costs of other hearings.

CHALLENGE CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 13145.)

(Supreme Court of Illinois. April 21, 1920.)

127 Northeastern Reporter, 83.

MASTER AND SERVANT—EVIDENCE HELD TO SUSTAIN INDUSTRIAL COMMISSION'S FINDING THAT INFECTION RESULTED FROM INJURY IN EMPLOYMENT.

Evidence *held* to sustain the Industrial Commission's award for partial loss of the use of the employee's hand based on finding that the infection causing the loss resulted in the course of employment and not from the employee's act in scraping a callous from his hand with a knife.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Error to Circuit Court, Kane County; Mazzini Slusser, Judge.

Proceedings before the Industrial Commission to recover compensation for injuries to John Carlson, employee, opposed by the Challenge Company as employer. From a judgment of the circuit court confirming Industrial Commission's award of compensation, the employer brings error. Affirmed.

J. C. M. Clow, of Chicago, for plaintiff in error.

Emil Benson, of Batavia, and Mighell, Gunsul & Allen, of Aurora, for defendant in error.

THOMPSON, J. This writ of error is prosecuted, by leave of court, to review the judgment of the circuit court of Kane county confirming an award of the Industrial Commission allowing compensation to defendant in error, John Carlson, for a permanent partial loss of the use of his right hand, growing out of an injury received in the course of and arising out of his employment. It is the contention of plaintiff in error that the loss of the use of the hand is not the result of said injury.

Defendant in error was 57 years of age at the time of the accident and had been employed by plaintiff in error as a woodworker for about 25 years. He was married and had two children, 10 and 15 years old, respectively. November 2, 1917, while at his work defendant in error suffered an injury which resulted in the crushing of the end of the index finger and the making of a blood blister on the side and near the distal joint of the middle finger of his right hand. By reason of his work the

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knuckles of Carlson's fingers had become calloused, and these callouses would become hard and sore, something like a corn. The blood blister was near the edge of the callous on the middle finger of Carlson's right hand. Carlson went to a physician, who dressed his fingers. November 26 he was discharged as cured. About December 5 the callous on the finger where the blood blister had been became sore, and Carlson scraped the calloused place with a pocketknife. There is no evidence, however, that in doing so he caused an incision or break in the skin. On December 8 he reported his condition to his foreman, when he quit work for the day, and on the 9th he went to a physician, who discovered a serious infection in or under the callous. The infection became so serious that it was necessary to remove the finger. As a further result of the infection the other fingers of the hand are stiffened, and the commission found a loss of two-thirds of the use of the right hand. It appears from the testimony of the physicians that it would be necessary to have an incision or wound before an infection could follow, and that it was entirely possible for the infection to be the result of the accident of November 2.

The award is consonant with justice when all the circumstances of the case are considered, and we are not prepared to say that there is no evidence in the record justifying the finding of the commission. With the record in this state we will not set aside such finding.

Judgment affirmed.

MARION COUNTY COAL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13141.)

(Supreme Court of Illinois. April 21, 1920.)

127 Northeastern Reporter, 84.

MASTER AND SERVANT—HOMICIDE HELD NOT RESULT OF ACCIDENT "ARISING IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

The killing of miner by car driver, both employees in coal mine, was not the result of an accident "arising in the course of the employment", and there was no causal connection between the employment and the killing, so that employer was not liable under Workmen's Compensation Act, it resulting from a quarrel about a past event in which deceased was the aggressor, he having complained of non-delivery to him the night before of an empty car and of the presence of a chain for the machine runner in the empty car just delivered.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Error to Circuit Court, Marion County; Thomas E. Ford, Judge.

Proceeding under the Workmen's Compensation Act by Lorenzo Benvanuta, administrator, opposed by the Marion County Coal Company, employer. An award by arbitrator was confirmed by the Industrial Commission, and again by the circuit court, and the Company brings error. Reversed.

Frank F. Noleman, Robert E. Wright, and June C. Smith, all of Centralia, for plaintiff in error.

A. W. Kerr, of Spirngfield, and F. H. Kruger, of Belleville, for defendant in error.

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CARTWRIGHT, J. Joe Muzzarelli was killed by Roy Orison in the mine of the plaintiff in error, the Marion County Coal Company, where both were employed, and the administrator of Muzzarelli's estate made application under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) for compensation for the death of his intestate. An arbitrator made an award, and on a review by the Industrial Commission the award was confirmed. The record was removed to the circuit court of Marion county by writ of certiorari, and the award was again confirmed, and the writ quashed. On the petition of the coal company a writ of error was awarded by this court.

There was no controverted question of fact. Joe Muzzarelli was employed as a miner by the plaintiff in error, and Roy Orison was a driver, delivering empty cars and hauling loaded cars away. In the room where Muzzarelli was employed machine men undercut the coal with a machine, and Muzzarelli was a digger and loader of coal on the cars. In the morning of August 31, 1917, Orison, according to custom, brought an empty car to the entrance of Muzzarelli's room. The car had a chain in it, weighing 35 pounds, called a "cutter head," which had been called for by the machine man, to be installed in the undercutting machine. It was the duty of Muzzarelli to push the empty car to the face of the coal, and the machine man was to remove the chain and install it. The loaders were paid according to the number of cars loaded, and the rule of the mine was that each loader should receive the same number of cars each day. At quitting time the day before Muzzarelli had received one car less than the other loaders, and this car was delivered to him the first one in the morning. When Orison put the car for Muzzarelli in the switch at the entrance of the room, Muzzarelli came there and commenced cursing Orison and calling him vile names and said that he did not give him a fair turn the day before. While Muzzarelli was cursing Orison and calling him vile names, he noticed the cutter head in the car, and said he did not want that car because there was a chain in it. Orison explained to him that he did not have to unload the cutter and that the machine men in the room would do it. There was a sprag in a wheel of a car which had run off the track, and Orison went to that car and pulled the sprag out and shoved the car on the track and walked back to Muzzarelli's car with the sprag in his hand. Muzzarelli was still cursing him and repeating the vile epithets, when Orison said if he did not shut up he would hit him on the head with the sprag, which was a stick of wood. Muzzarelli came toward Orison and made a jump as if to grab him, when Orison struck him on the head with the sprag and killed him. The fact that the chain was in the empty car did not impose any duty on Muzzarelli or interfere in the slightest degree with his duties or service, but it was to be taken out by others for use in the undercutting machine.

An employer is liable to pay compensation for an accidental injury to his employe arising out of and in the course of the employment, but he is only so liable when the injury is the result of an accident arising in the course of the employment and when there is a causal connection between the employment and the injury. There have been several cases where an injury has resulted from an assault when the employe was engaged in the performance of his duties so that the employment could be said to be the origin or cause of the accident and injury, and in each of those cases an award has been sustained. In Ohio Building Safety Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149, the assault was upon a night watchman and was a natural incident of the employment and his duties, and the injury was regarded as resulting from the employment. In Pekin Cooperage Co. v. Industrial Com., 285 Ill. 31, 120 N. E. 530, the employe making the assault had taken staves from the rack of the injured employe and put them in his own and was the aggressor, while the injured employe did no more than to defend

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himself and was in no way responsible for the assault. In Swift & Co. v. Industrial Com., 287 Ill. 564, 122 N. E. 796, the court held that the evidence warranted a conclusion that the altercation in which a steamfitter was injured was not personal, but grew out of matters connected with his work, and that he was not the aggressor. In Chicago, Rock Island & Pacific Railway Co. v. Industrial Com. 288 Ill. 126, 123 N. E. 278, where a locomotive boiler-washer was killed, the court concluded that there was a causal connection with the conditions under which the employe was required to perform his work and the consequent injury. None of these cases, in which the injured party was not the aggressor, but was injured in the course of his employment, would justify upholding the award in this case, in which the quarrel was about a past event, and in which Muzzarelli was the aggressor. His cursing and abuse of Orison were not in respect to anything being done at the time and had no relation or connection with the present work or present conditions. Muzzarelli was not performing any duty or protecting any property, and was not hired to incite, begin, or carry on a quarrel with Orison about the fact that it happened at the last delivery of empty cars the day before there was a car due him, and it was not delivered until the next morning. There was no reason whatever for his conduct on account of the chain, which was properly delivered in the car for the machine runner in accordance with a request and was to be taken out by the machine runner, and not by Muzzarelli. The interests of the employer were not being aided, protected, or advanced in any manner by what Muzzarelli did, and the quarrel and consequent injury had no reasonable connection with any work then being done for the plaintiff in error.

The judgment of the circuit court is reversed, and the award of the Industrial Commission set aside.

Judgment reversed.

CITY OF CHICAGO v. INDUSTRIAL COMMISSION ET AL.

(No. 13154.)

(Supreme Court of Illinois. April 21, 1920.)

127 Northeastern Reporter, 49.

1. MASTER AND SERVANT — COMPENSATION ACT APPLIES ONLY TO RISKS OF EMPLOYMENT.

An accident, to be within the Compensation Act, must have its origin in some risk of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

2. MASTER AND SERVANT — INJURY THROUGH QUARREL NOT WITHIN COMPENSATION ACT.

Where an employee of a city unloading a freight car refused to get a negro workman a drink when he was getting one for himself, and was called a name by the negro and told he would be knocked in the head if he climbed the car, a threat which was fulfilled to his fatal injury when he returned to his work, the injury did not have its origin in a risk of the employment, and the widow is not entitled to compensation under the Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

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Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Bridget Gallagher, the widow, for the death of her husband John Gallagher, opposed by the City of Chicago, the employer. Compensation was awarded by the Industrial Commission, the award confirmed by the circuit court, and the City brings error. Judgment reversed, and award set aside.

Samuel A. Ettelson, Corp. Counsel, and William H. Devenish, City Atty., both of Chicago (Robert H. Farrell, of Chicago, of counsel), for plaintiff in error.

Joseph P. Mahoney, of Chicago (W. P. Quinby, of Chicago, of counsel), for defendants in error.

DUNN, C. J. John Gallagher, a laborer in the employ of the city of Chicago, was at work on August 3, 1917, loading sand from a freight car into wagons near the municipal pier. He got down from the car and went to a hydrant to get a can of drinking water, with which he returned to the car. A negro named Ramsey was working on an adjoining car and asked Gallagher for a drink, but Gallagher told him to get his own water. Ramsey called him a name and told him to climb on the car and he would knock his head. Gallagher said nothing, but after standing there for a few minutes climbed upon the car to go on with his work, and Ramsey called him a name and struck him on the head with a shovel. Gallagher died as a result of the injury, and the Industrial Commission affirmed a decision of an arbitrator allowing compensation to his widow. The circuit court confirmed the decision of the Industrial Commission, and upon the petition of the city a writ of error was awarded to review the judgment of the circuit court.

[1, 2] The only question in the case is whether the accident arose out of the deceased's employment. The rule is that an accident, to be within the Compensation Act (Hurst's Rev. St. 1917, c. 48, §§ 126-152i), must have had its origin in some risk of the employment, but the cases are so various that it is impossible to establish a fixed rule for determining what is a risk of the employment. We have held that an injury to an employe in a fight with another employe growing out of a quarrel about the employer's work in which they were engaged arises out of the employment. In Pekin Cooperage Co. v. Industrial Com., 285 Ill. 31, 120 N. E. 530, we held that there must be some causal relation between the employment and the injury, and though it is not necessary that the injury be one which ought to have been foreseen or expected, it must be one which after the event may be seen to have had its origin in the nature of the employment. The injury for which the claimant was held in that case to be entitled to compensation was received in a fight with another employe growing out of a quarrel in regard to the manner of doing their work, and it was held for this reason that it might be inferred that the injury arose out of the employment, because where men are working together at the same work differences may be expected to arise about the manner of doing the work, the use of tools, interference of the workmen with one another, or other details. Swift & Co. v. Industrial Com., 287 Ill. 564, 122 N. E. 796, was also a case of an injury received in a fight between two employes. The decision holding that the dispute arose out of the employment and that the employer was liable for compensation was based upon the proposition that the altercation grew out of matters connected with the employe's work and was not purely a personal one entirely outside the scope of his employment. These cases were entirely different from the present case. The felonious assault which was made upon the deceased was without any excuse. It had no more connection with the work in which he was engaged than if Ramsey had been a loiterer on the street and had asked for a drink from Gallagher's can. There was no causal relation between the work

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and the assault. The affair was purely personal, with no reference to the employment. Ramsey and Gallagher happened to be at the same place because of their employment, but an injury done by one to the other on account of some purely personal grudge which this proximity gave an opportunity to inflict was not a result of the employment. There was no causal connection between the conditions under which the work was to be done and the injury. The injury was not incidental to the character of the business, but the deceased would have been equally exposed to it entirely apart from his employment.

The judgment will be reversed, and the award set aside.

Judgment reversed.

CITY OF CHICAGO v. INDUSTRIAL COMMISSION ET AL.
(No. 13171.)

(Supreme Court of Illinois. April 21, 1920.)

127 Northeastern Reporter, 46.

3. MASTER AND SERVANT — WRIT OF ERROR TO REVIEW PREVIOUS AWARD OF INDUSTRIAL COMMISSION MUST BE WITHIN TIME LIMITED BY NEW STATUTE.

The amendment of Workmen's Compensation Act, § 19, by Laws 1919, p. 548, so as to limit review by the Supreme Court to writ of error applied for at the first Supreme Court term following the rendition of the circuit court judgment applies to a writ of error to review a judgment by the circuit court entered before it became effective.

(For other cases, see Master and Servant, Dec. Dig. § 418[3½].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings before the Industrial Commission by Clara Ostiller, as administratrix, to recover compensation for the death of Peter Ostiller, opposed by the City of Chicago, employer. The award of compensation by the Industrial Commission was approved by the circuit court, and the City brings error. Writ of error dismissed.

Samuel A. Ettelson, Corp. Counsel, and William H. Devenish, City Atty., both of Chicago (Robert H. Farrell, of Chicago, of counsel), for plaintiff in error.

Busch, Leesman & Roemer, of Chicago (David H. Greenberg, of Chicago, of counsel), for defendant in error.

CARTER, J. This is an action instituted before the Industrial Commission of Illinois by Clara Ostiller, administratrix of the estate of her husband, Peter Ostiller, deceased, under the provisions of the Workmen's Compensation Act, for compensation for the death of her husband while acting as a police patrolman for the city of Chicago; it being claimed that he came to his death by an injury suffered in the line of his employment on June 12, 1918. On hearing before the Industrial Commission the facts were largely stipulated and the finding was in favor of the claimant. On review in the circuit court of Cook county the award of the Industrial Commission was affirmed June 10, 1919; the trial judge

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on said date entering an order that the cause was one proper to be reviewed by this court, and the case was brought here at the February term, 1920, by writ of error.

Under section 19 of the Workmen's Compensation Act in force at the time this order was entered in the circuit court, it was provided that the cause could be brought to this court by writ of error on the certificate of the trial judge that the cause was one proper to be reviewed in this court (Hurd's Stat. 1917, p. 1462), and this court, in construing that statute, has held that the writ of error, after that certificate was made, could be sued out of this court any time within three years. Western Electric Co. v. Industrial Com., 285, Ill. 279, 120 N. E. 774. Section 19 was amended by the last Legislature, the amendment going into force July 1, 1919, so as to provide that the judgment and orders of the circuit court under the act "shall be reviewed only by the Supreme Court upon a writ of error which the Supreme Court in its discretion may order to issue, if applied for not later than the second day of the first term of the Supreme Court following the rendition of the circuit court judgment or order sought to be reviewed, provided," etc. Laws of 1919, p. 548.

[1] It is argued by counsel for plaintiff in error that, as this amendment had become effective before the suing out of this writ of error, the only way this cause could properly be brought here after July 1, 1919, was by applying to this court, under amended section 19, not later than our October term, 1919, and that, as this application was not made until the February term, 1920, this court, under the statute, is without authority to review the case by writ of error. This court has always consistently held that the suing out of a writ of error is the bringing of a new suit. Freesen v. Scott County Drainage District, 283 Ill. 536, 119 N. E. 625, and cases cited.

[2] Counsel for defendant in error argue that this, being a new suit, is governed by the law relative to procedure and practice in force at the time the new suit was instituted. This court has repeatedly held that the law is well settled that there can be no vested right in any particular remedy, method, or procedure, and "that, while the general rule is that statutes will not be so construed as to give them a retrospective operation unless it clearly appears that such was the legislative intention, still, when the change merely affects the remedy or the law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law, and without regard to whether suit had been instituted or not, unless there is a saving clause as to existing litigation." Chicago & Western Indiana Railroad Co. v. Guthrie, 192 Ill. 579, 61 N. E. 658. To the same effect are Dobbins v. First Nat. Bank, 112 Ill. 553; Winslow v. People, 117 Ill. 152, 7 N. E. 135; People v. Clark, 283, Ill. 221, 119 N. E. 329, and cases cited.

[3] There can be no question, under these authorities, that this amendment merely affected practice and procedure, and that, as there is no vested right in practice and procedure, the writ of error after July 1, 1919, could only be sued out in accordance with the provisions of the statute as amended. This being so, clearly this court is without jurisdiction to hear this cause on a writ of error brought at the February term, 1920, several months after the law was amended providing that the only method by which the decision of the trial court could be reviewed in this court would be by writ of error or order of this court within the time limited.

Counsel for the defendant in error also argue that, even though the claim of plaintiff in error as to following the former procedure were a vested right, the case could only be brought to this court after July 1, 1919, under the reasoning of the authorities already cited, par-

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ticularly Dobbins v. First Nat. Bank, supra, not later than our October, 1919, term. In view of our holding that it is not a vested right, it is unnecessary to decide this question.

The court being without jurisdiction to hear this case, the writ will be dismissed.

Writ dismissed.

NATIONAL ZINC CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 12868.)

(Supreme Court of Illinois. April 21, 1920.)

127 Northeastern Reporter, 135.

1. MASTER AND SERVANT—ADMINISTRATOR MAY FILE PETITION UNDER COMPENSATION ACT.

Either an administrator, a beneficiary, or an employer may file petition for adjustment of a claim under Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 400.)

2. MASTER AND SERVANT—AWARD UNDER COMPENSATION ACT TO ADMINISTRATOR DISTRIBUTABLE UNDER ORDER OF APPOINTING COURT.

If award under Workmen's Compensation Act is made to an administrator, the compensation is to be distributed pursuant to an order of the court appointing him.

(For other cases, see Master and Servant, Dec. Dig. § 386[5].)

3. MASTER AND SERVANT—PROOF OF BENEFICIARY NECESSARY FOR AWARD UNDER COMPENSATION ACT.

Whoever files the petition under Workmen's Compensation Act, existence of a beneficiary at time of hearing is essential to award, and must be affirmatively shown.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT—PRESUMPTION OF CONTINUANCE OF LIFE HELD INSUFFICIENT TO SHOW EXISTENCE OF BENEFICIARIES UNDER COMPENSATION ACT.

Though deceased employee's father and mother, respectively 60 and 40 years old, were seen at their residence in Russian Poland in August, 1915, the presumption of continuance of life is insufficient for the necessary showing of existence of beneficiaries at the time of the hearing before the Industrial Commission, 26 months later, that country having in the meantime been overrun by hostile armies and devastated and robbed of the means of sustenance.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

6. MASTER AND SERVANT — PROCEDURE IS GOVERNED BY COMPENSATION ACT AS AMENDED PRIOR TO FILING OF PETITION.

Procedure in a proceeding under the Workmen's Compensation Act is governed by the act as amended prior to the filing of the petition for adjustment of the claim.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

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7. MASTER AND SERVANT — REMANDED TO INDUSTRIAL COMMISSION PROPER, WHERE THERE IS MERELY INSUFFICIENT PROOF OF BENEFICIARIES UNDER COMPENSATION ACT.

Under Workmen's Compensation Act, § 19f, authorizing the court to remand the cause to the Industrial Commission for further proceedings, stating the questions requiring further hearing, it should, on application, do so; there being merely an insufficiency of proof as to existence of alleged beneficiaries.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Error to Circuit Court, Sangamon County; E. S. Smith, Judge.

Proceeding by Frank L. Trutter, administrator, under the Workmen's Compensation Act, for compensation for death of Frank Gricis, opposed by the National Zinc Company, the employer. Award of arbitrator, confirmed by the Industrial Commission, was set aside by the circuit court, and the administrator brings error. Reversed and remanded, with directions.

William J. Lawler and Isidor Yacktis, both of Springfield, for plaintiff in error.

Patton & Patton, of Springfield, for defendants in error.

CARTWRIGHT, J. Frank L. Trutter, administrator of the estate of Frank Gricis, deceased, applied to the Industrial Commission for compensation for the death of his intestate from an injury sustained in the service of the National Zinc Company. There was a hearing before an arbitrator, resulting in an award on August 7, 1917, and on a review of the Industrial Commission the award was confirmed on December 31, 1917. A writ of certiorari was sued out of the circuit court of Sangamon county, and the decision of the Industrial Commission was reversed and the award set aside by the court. A certificate was made that the cause was one proper to be reviewed by this court, and by virtue of that certificate the administrator sued out a writ of error.

It was agreed that Frank Gricis and the National Zinc Company were operating under the provisions of the Workmen's Compensation Act of 1913, and on February 19, 1915, Gricis received an injury arising out of and in the course of his employment, which resulted in his death.

The evidence was, in substance, as follows: Frank Gricis was unmarried and about 22 years old at the time of his death. He was a Lithuanian, born in Russian Poland, near Kovno, and lived there with his parents on a small farm worth from $300 to $400, until July 19, 1914, when he left for America, reaching Springfield, Ill., in August and beginning work for the National Zinc Company. While he lived in Russian Poland he worked a part of the time for his father and a part of the time cultivating land for others, receiving a part of the produce for his pay. The produce thus earned was received by his father or himself, and was used, according to the custom of the country, for the support of his father and mother and their family. His father and mother and other members of his family survived him, and the award was based on a finding of that fact, and that he had contributed to the support of his father and mother within 4 years prior to the date of his injury and death. The objections to an award of compensation were upon the grounds that the administrator was not a proper party to make a claim for compensation, and that the evidence did not show there were persons living at the time of the hearing who were beneficiaries under the Workmen's Compensation Act.

[1-4] Either an administrator, a beneficiary, or an employer may file a petition for the adjustment of a claim for compensation. Ham-

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mond Co. v. Industrial Com., 288 Ill. 262, 123 N. E. 384; Mississippi River Power Co. v. Industrial Com., 289 Ill. 353, 124 N. E. 552. If an award is made to an administrator, the compensation is to be distributed pursuant to an order of the court appointing him. In either case the existence of a beneficiary at the time of the hearing furnishes the sole basis of a claim for compensation, and an award can only be made upon affirmative proof of that fact. Keystone Steel & Wire Co. v. Industrial Com., 289 Ill. 587, 124 N. E. 542. The administrator, having the burden of proving that there were beneficiaries living at the time of the hearing, offered evidence that when Frank Gricis left Russian Poland he left there his father, Staponas Gricis, sixty years of age, his mother, Agota Gricis, forty years of age, and brothers and sisters constituting the family. A Lithuanian who lived near Kovno testified that he saw the father and mother and a minor sister on August 15, 1915, when he left that place and started for America, coming by way of Russia, Siberia, and China. He did not see the brothers, who had gone to the army, and he testified that the Germans came and took the country the last day he was there, but as he did not see the Germans that statement was stricken out by the arbitrator. However, it is a matter of universal knowledge that Russian Poland was overrun by the German armies, with all the attendant consequences, and testimony of that fact was not required. There was no further evidence tending to show whether the father or mother was alive or dead after the German invasion on August 15, 1915, and the fact that they were living at that time is relied upon solely as evidence that they were living on October 24, 1917, at the time of the hearing before the commission.

[5] As the application for compensation may be made either by a beneficiary or an administrator, the requirement of proof must necessarily be the same, and no advantage can be gained with respect to the existence of a beneficiary by any application of an administrator. In this case the application was made by the administrator on October 6, 1916, and he did not claim to have heard from the father or mother or to represent them in any way or to know anything about them, except that they were living on August 15, 1915. He depends only on the presumption of fact that the father and mother were living at the time of the hearing.

Presumptions are either of law or fact, and either conclusive or rebuttable. In McCagg v. Heacock, 34 Ill. 476, 85 Am. Dec. 327, it was said that legal presumptions are rules established by the common law or by statute, founded upon the first principles of justice or the laws of nature or the experienced course of human conduct and affairs and the connection usually found to exist between certain things; that where one fact is proved or ascertained, another which uniformly exists in connection with it is presumed without proof, and many of these presumptions are conclusive and all opposing evidence is forbidden. In Sutphen v. Cushman, 35 Ill. 186, it was said that presumptions of fact are conclusions drawn from particular circumstances, and are such as are formed by experience, and either do not arise or are rebutted if they do not correspond with or are not adequate to the circumstances actually proved, or, if other circumstances are proved which are inconsistent with the hypothesis, the presumption is at once rebutted. If a person is absent from his usual place of abode and no word has been received from him within 7 years and no account can be given of him, these facts, on grounds of public policy, raise a rebuttable presumption that he is dead, but there is no presumption of continuance of life during the 7 years or at what time during the period the death occurred. There is a general presumption of fact against a change under established and settled conditions, and where human life is once shown to exist it will, as a matter of fact, be presumed to continue under the same conditions for a reasonable time. The presumption is based on common experience as to the continuance of life, and is of greater or less force,

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according to the circumstances. In Chicago & Alton Railroad Co. v. Keegan, 185 Ill. 70, 56, N. E. 1088, it was presumed, as an inference of fact, that a man who was living on April 3, 1860, was living on June 15, 1865, and it was held that such a presumption would be warranted unless the contrary was proved or was to be inferred from the nature and circumstances of the case. In Donovan v. Major, 253 Ill. 179, 97 N. E. 231, it was considered that all the circumstances were to be taken into account in determining the existence and force of the presumption.

When the presumption of death after 7 years is applied, not only is there no presumption when the death occurred during that period, but the application of an alleged rule that continuance of life is presumed until overcome by presumption of death would be most unreasonable in a case like this, where the right to any compensation depends upon continued existence. By such a rule an application by an administrator for compensation to a person not heard from for any period within the 7 years, and of whom no account could be given, would be sustained on the basis of presumption. It is true that the fact of a country being overrun with hostile armies, devastated and robbed of the means of subsistence, does not prove the death of any particular individual, but it does very materially affect the chances of existence of all the individuals. So far as there is any presumption of the continuance of life it is subject to be controlled by facts and circumstances and can only be said to exist with any particular force where conditions are not changed. The burden of proving that Staponas Gricis and Ágota Gricis were still living at the time of the hearing rested upon the administrator, and not on the employer, and this court has considered that there ought to be satisfactory evidence in such a case of the existence of beneficiaries, which lies at the foundation of any claim for compensation. Keystone Steel Wire Co. v. Industrial Com., supra. It would hardly be regarded as sufficient if some one applied, in the names of the father and mother, for compensation and could only show that they were living more than 2 years before the hearing, and the same rule must be applied to the administrator. If the commission is to act on a presumption of continued life until overcome by a presumption of death, 6 years would sustain the presumption as well as 2, and an age of 90 years of a beneficiary as well as 60. It is a fair rule for all parties that the existence of a beneficiary should be proved, rather than that an award should be made to an administrator without proof, and later an inquiry whether there is any one to whom payment can be made. The circuit court was right in the conclusion that the existence of the alleged beneficiaries was not sufficiently proved to justify an award.

[6, 7] Upon the decision being made by the court the administrator moved to amend the proceedings by substituting Staponas Gricis and Agota Gricis as applicants for compensation, and to remand the cause to the Industrial Commission for a further hearing. The court denied the motion on the ground that Staponas Gricis and Agota Gricis were not present in court in person or by authorized attorney or within the jurisdiction of the court, and that there was no evidence that they were still living. The petition for the adjustment of the claim was filed after the amendment of 1917 (Laws 1917, p. 490), and the procedure was therefore governed by that act. Suburban Ice Co. v. Industrial Board, 274, Ill. 630, 113 N. E. 979. Section 19f (Hurd's Rev. St. 1917, c. 48, § 144) provided that the court might remand the cause to the Industrial Board for further proceedings, and might state the questions requiring further hearing. There being merely an insufficiency of proof as to the

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existence of the alleged beneficiaries, the application should have been remanded to the Industrial Commission for the purpose of permitting further proof as to that fact.

Accordingly the judgment of the cihcuit court is reversed, and the cause remanded, with directions to remand the cause to the Industrial Commission.

Reversed and remanded, with directions.

FRANKFORT GENERAL INS. CO. v. CONDUITT ET AL.
(No. 10551.)

(Appellate Court of Indiana, Division No. 2. April 20, 1920.)

127 Northeastern Reporter, 212.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION AGREEMENT, THOUGH MADE WITHOUT NOTICE TO INSURER, BINDING TILL REVOKED.

Since Workmen's Compensation Act, §§ 22, 58, 74, section 57 as amended by Acts 1917, c. 81, sections 59-61 as amended by Laws 1917, c. 63, section 73 as amended by Acts 1919, c. 57, relating to proceedings before the Industrial Board, and the other provisions of the act, do not provide for notice to the insurance carrier nor for making it a party to an agreement under section 57 for compensation, such agreement, when approved by the board, is binding upon the parties until revoked, though the insurer had no actual notice of its execution or approval.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT — INSUREK MAY BECOME A PARTY ENTITLED TO MAKE APPLICATION TO VACATE APPROVAL OF COMPENSATION AGREEMENT.

Though under the provisions of the Workmen's Compensation Act, which are a part of insurance contract, the insurer is not a necessary party to a compensation agreement and to an applicant for compensation, it is a party in interest entitled to all of employer's rights, including that of appeal, and on its request should be made a party, and is then entitled to apply under section 58 to vacate the order approving the agreement.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT — APPEAL LIES FROM ORDER DENYING INSURER'S APPLICATION TO VACATE APPROVAL OF COMPENSATION AGREEMENT.

The word "award" in Workmen's Compensation Law, § 61, as amended by Laws 1917, c. 63, authorizes an appeal within 30 days from the date of the award, does not limit the right of appeal to a matter wherein compensation has been awarded or denied, and an appeal lies from the final order of the Industrial Board denying an application by the insurer to set aside an approval of a compensation agreement.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

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4. MASTER AND SERVANT—INSURER APPLYING TO VACATE APPROVAL OF COMPENSATION AGREEMENT NOT ALLOWED TO MAKE NEW CASE.

While the Industrial Board has power, in case of fraud, duress, or mistake, to vacate its approval of a compensation agreement, an application therefor should not be granted to allow a party to make a new and distinct case; it not being the policy of such statutes that there be retrials for error as in ordinary action.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

5. MASTER AND SERVANT — CITY FIREMAN HELD AN EMPLOYEE WITHIN COMPENSATION INSURANCE POLICY.

Where the insurance carrier intended that the policy should cover city firemen, their salaries being considered in fixing the premium received. and insurer prepared the report of a fireman's death to be filed with the Industrial Board and also compensation agreement between the city and the firemen's dependents which was approved by the board and paid, the fireman was an employee of the city in so far as insurer was concerned.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

6. MASTER AND SERVANT—INSURER'S MISCONCEPTION OF LAW NOT GROUND FOR SETTING ASIDE COMPENSATION AGREEMENT.

A mere misconception on the part of the insurance carrier as to the law is not of itself such a mistake as will authorize the setting aside of a compensation agreement approved by the Industrial Board.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Industrial Board.

Application by the Frankfort General Insurance Company to vacate the approval by the Industrial Board of a workmen's compensation agreement between the city of New Castle and Idell Conduitt and others, dependents of George A. Conduitt, a member of the city fire department. The application was denied, and the insurer appeals. Affirmed.

Elmer E. Stevenson, of Indianapolis, for appellant.

Evans & Dewitt and Barnard & Barnard, all of New Castle, for appellees.

McMahan, J. This is an application by appellant to set aside and vacate the approval by the Industrial Board of a workmen's compensation agreement entered into between the city of New Castle and the other appellees, who are the dependents of George A. Conduitt.

On and prior to February 25, 1916, George A. Conduitt was a member of the fire department of the city of New Castle, and on said day while engaged in an effort to extinguish a fire in said city, and while so doing, he accidentally received an injury which arose out of and in the discharge of his duties as such fireman, and which resulted in his death February 26, 1916. Within a few days after said death, the appellant by an authorized representative made an investigation of the facts, and caused a report of said injury and death to be filed with the Industrial Board. On March 6, 1916, appellant prepared a compensation agreement upon the form prescribed by the Industrial Board, and caused it to be executed by the city of New Castle and the other appellees, they being the dependents of George A. Conduitt, in which it was agreed that the city of New Castle would pay said dependents a weekly compensation of $6.93 per week for a period not exceeding 300 weeks, and

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funeral expenses not to exceed $100. Said agreement was filed with the Industrial Board by the appellant, and on March 9, 1916, was approved by a single member of said board. No application to review the action of the board approving said agreement was ever filed. In accordance with said agreement, said city paid to the appellees the compensation fixed by said agreement for a period of 104 weeks, and also paid burial expenses in the sum of $100, all of which was repaid to it by the appellant.

August 31, 1918, the appellant filed its petition to vacate the approval of the said agreement of compensation alleging that, by the mutual mistake and misunderstanding of all of the parties to said agreement, it was erroneously assumed that George A. Conduitt at the time he received the injuries which resulted in his death was an employe of said city, and that said agreement was entered into as the result of said mutual mistake, and not otherwise; that, as a matter of fact, said George A. Conduitt was not an employe of the city of New Castle, but was a public officer, and that appellant was not bound under its policy of insurance to pay compensation to the dependents of said decedent; that there was not and is not any liability under the law on the part of either said city of New Castle or appellant to pay any workmen's compensation; that said compensation agreement was executed, and all the payments of compensation were made, without any consideration; and that, upon discovering said mistake, payment of compensation was discontinued. The city of New Castle, having refused to file a petition to vacate said approval, was made a party defendant. Prayer that the Industrial Board set aside and revoke its approval of said compensation agreement and declare said agreement void.

A hearing upon this application was had before the Industrial Board after notice, and the application of appellant to set aside and vacate the approval of the compensation agreement was denied, from which appellant prosecutes this appeal.

[1] The appellees have filed a motion to dismiss this appeal for the alleged reason that no appeal from the order of the Industrial Board denying an application to vacate the compensation agreement is authorized.

Section 57 of the Workmen's Compensation Act as amended, Acts 1917, p. 228, provides that if the employer and the injured employe, or his dependents in case of death, reach an agreement in regard to compensation, a memorandum of the agreement in the form prescribed by the Industrial Board shall be filed with the board, and if approved by the board shall be enforceable by court decree.

Section 58, Acts 1915, p. 410, provides that if the employer and the injured employe, or his dependents, fail to reach an agreement in regard to compensation, or if they have reached such agreement which has been signed and filed with the board, and compensation has been paid or is due in accordance therewith, and the parties thereto disagree as to the continuance of any weekly payment under such agreement either party may make application to the baord for a hearing in regard to the matters at issue and for a ruling thereon.

Section 59, as amended, Acts 1917, p. 154, provides that—

"The board, by any or all of its members, shall hear the parties at issue, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of proceedings, and a copy thereof shall immediately be sent to each of the parties in dispute."

Section 60, Acts 1917, p. 154, provides that—

"If an application for review is made to the board within seven days from the date of the award, * * * the full board, if the first hearing was not held before the full board, shall review the evidence, or, if

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deemed advisable, hear the parties at issue, their representatives and witnesses as soon as practicable and shall make an award and file same, with a finding of the facts on which it is based. * * *"

Section 61, Acts 1917, p. 155, relates to appeals, and provides that—

"An award of the board by less than all of the members as provided in section 59, if not reviewed as provided in section 60 shall be final and conclusive. An award by the full board shall be conclusive and binding as to all questions of fact, but either party to the dispute may, within thirty days from the date of the award, appeal to the Appellate Court for errors of law under the same terms and conditions as govern appeals in ordinary civil actions. * * *"

Section 73 requires that the policy of insurance issued by appellant contain a clause to the effect that notice to or knowledge by the employer of the occurrence of an injury should be deemed notice to the insurance carrier; that jurisdiction of the employer for the purpose of the act should give jurisdiction of the insurer; and that the insurer should in all things be bound by and subject to the awards, judgments, or decrees rendered against the employer. This section has been amended Acts 1919, p. 172, and now requires the policy to contain other provisions. The effect of this section is to make the insurance carrier a party to the award made by the Industrial Board.

Section 74 provides that the policy should be construed as a direct promise by the insurance carrier to pay to the person entitled to compensation all benefits awarded under the act.

With certain exceptions, it is made the duty of the employe or his representative to give the employer written notice of the occurrence of the injury. Section 22.

No provision is made anywhere in the act for notice to the insurance carrier, nor for making it a party to the agreement for compensation, nor to the application by the employe for compensation. The agreement between the employer and the employe under section 57, when approved by the board, is binding on the parties thereto as long as it stands unrevoked, even though the insurer had no actual notice of its execution or approval.

[2] It evidently was not the intention of the Legislature that it should be necessary to make the insurance carrier a party to the agreement between the employer and employe for compensation, nor to the proceedings before the Industrial Board asking its approval of the agreement. The provisions of the Compensation Act entered into and became a part of the contract of insurance, and, while the insurance carrier was not a necessary party to the agreement for compensation or to an application filed with the Industrial Board for compensation, it does not necessarily follow that it was not a proper party. Under the law, and its contract of insurance, the appellant as an insurance carrier was, as heretofore stated, bound by and subject to the award, judgment, and decree rendered against the employer. Being a party in interest, it was a proper, though not necessary, party to the agreement for compensation, and to an application for compensation. When an insurance carrier is made a party, it is entitled to all the rights of the employer, including the right of appeal. If an insurance carrier seasonably appears before the Industrial Board and asks to be made a party to the proceedings, its request should be granted.

The board fixed a date for the hearing and notified the parties of the time and place of such hearing. A hearing was had before one of the members of the board in accordance with section 59, and the application denied. Within seven days thereafter, the appellant filed an application for a review before the full board. The hearing was had before the full board, and the application was again denied.

The appellant, as insurance carrier, was an interested party, and the city of New Castle, having failed and refused to file an application to

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vacate and set aside the approval of the agreement for compensation, had the right under section 58, supra, to file an application to vacate said order of approval, and the Industrial Board had authority, under the sections hereinbefore mentioned, to hear said application and make a ruling thereon.

[3] Section 61, supra, authorized an appeal within 30 days from the date of the "award." Technically speaking, the action of the board in denying the application is not an award. Our judgment, however, is that the Legislature by the use of the word "award" did not intend to limit the right of appeal to a matter wherein compensation had been awarded, and to deny an appeal where the application of the employe had been denied. Our judgment is that an appeal lies from the final order of the board on appellant's application filed herein, the same as if such petition had been filed by the employer. The motion to dismiss the appeal will therefore be overruled.

[4] In re Stone, 117 N. E. 669, the employer and employe entered into a compensation agreement which was approved by the Industrial Board. About six weeks thereafter the employe filed with the Industrial Board a petition alleging a mutual mistake as to the terms of the agreement and the amount of compensation payable thereunder. This court, in discussing the question as to whether the Industrial Board had jurisdiction to consider said application, said:

"But assuming that it was intended by the employer as a compromise settlement, we are of the opinion still that the Industrial Board under its broad supervisory powers expressly conferred by the statute creating it would have the power to hear and determine the petition before it at any time before the case was finally disposed of. Its jurisdiction in such matters is not dependent upon the setting aside of the agreement. Such jurisdiction exists over the subject-matter and the parties notwithstanding the agreement whether it be an agreement upon the facts giving the board jurisdiction only or whether it be a compromise settlement of all compensation due under the act, and is broad enough to include all disputes between the employer and the injured employe or his dependents with reference to the compensation to be paid or received under the act. In arriving at the conclusion above reached we do not hold that the Industrial Board is more than an administrative body or arm of the government, which in the course of its administration of the law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts quasi judicially. It is not a court, and is not vested with judicial powers within the general acceptation of that term. Neither do we hold that the Industrial board has the power to set aside its own acts in the absence of fraud, duress, or mistake, being averred in a petition filed for that purpose, and after such fact has been fully shown by the proof."

The Ætna Life Insurance Co. v. Shiveley, 121 N. E. 50, the appellant, insurance carrier, filed an application to set aside an order concerning the compensation agreement entered into between the employer and the dependents of the insured. It was held that where "An insurance carrier, for sufficient cause shown, seasonably petitions to be admitted as a party to any such proceeding, the plainest principles of justice demand that it be admitted and heard." The insurance carrier in that case was not a party to the compensation agreement, although it had knowledge that the agreement had been entered into and had been filed with the Industrial Board, and had notified the Industrial Board that it was objecting to its approval. Without fixing a date and without notifying the insurance carrier, the board approved the agreement, and made an award in accordance therewith. After holding that the mere fact that an insurance carrier was not a party to the execution of such agreement or to a proceeding directed to its approval does not invalidate it even as against such insurance carrier, the court in discussing the subject said:

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"It does not follow, however, that an employer and an injured employe, or dependents of the latter in case of his death may, over the opposition of the insurance carrier, bind the latter by such an agreement, regardless of the good faith of the parties or the merits of the involved claim. Where such an agreement is the result of mistake, or is tinctured with fraud, or characterized by gross irregularity affecting the substantial rights, or has no meritorious foundation, in fact, or the like, we do not regard it as binding on the insurance carrier, either before or after its approval, as against a proper proceeding, seasonably made, to right the consequent wrong."

As stated in the opinion just referred to:

"The board is not expressly authorized to vacate an order approving such an agreement as is involved here. It is expressly authorized to approve such an agreement, fairly made, and conforming to the act. It necessarily follows that, as an incidental power the board is authorized to determine whether such an agreement was fairly made and whether it does conform to the act. But when the board's approval has been procured by fraud, or as a result of mistake or the like, and where as a consequence the agreement and its approval have no just foundation upon which to stand, it seems to us apparent that in any pending proceeding the board, as an incidental power, has a right to determine such fact, and, if found to exist, annul the order approving the agreement. * * * There should, however, be some finality in the action of the board. Where an insurance carrier has had reasonable opportunity to be heard on the proposition of the approval of such an agreement, but has failed to avail himself thereof, his motion to vacate such order should not be entertained unless he clearly excuses the failure."

While holding that the Industrial Board has the power in case of fraud, duress, or mistake to vacate its approval of a compensation agreement and to entertain an application for that purpose, such application should be scrutinized closely and cautiously granted. It is important that a case under the Workmen's Compensation Act solemnly adjudicated should not be reopened for the purpose of allowing a party to make a new and distinct case. Benjamin v. Brabban, 90 N. J. Law, 355, 103 Atl. 688. It is not the policy of such statutes that there be retrials for error as in an ordinary action. Upon the hearing an award is entered, which for all practical purposes has the effect of the award of an arbitrator under the common law.

[5] In addition to the facts heretofore set out, the board found that the salary of George A. Conduitt was fixed by an ordinance, and that the compensation insurance policy issued by the appellant to the city of New Castle was intended to cover the city firemen as employes; that, on account of said liability to the said fireman of said city, the appellant collected as a premium from said city the sum of $608.72 which it has at all times retained and has never returned the same or any part thereof, nor offered to return the same or any part thereof to said city. It is also found that the appellant was fully informed about the facts when it filed with the Industrial Board the report of the death of said George A. Conduitt; that when it procured the execution of the compensation agreement, and when it filed the same with the Industrial Board, it was not deceived or mistaken as to any fact in connection therewith, and there was no mutual mistake of fact between any of the parties; that if there was any mistake it was a mistake of law; that, in determining the premium upon said policy issued by the appellant to said city, the compensation paid to the members of the fire department of said city was included as a part of the pay roll of the employes of said city, and the premium was based upon said pay roll including the compensation of the city firemen.

In Kennedy v. Kennedy Mfg. Co., 177 App. Div. 56, 163 N. Y. Supp. 944, the court said:

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"When the policy was taken, the insurer knew of his position in the company, and included his salary in the pay roll upon which the premium was based. * * * The insurer, by treating the claimant as an employe and including his salary in the pay roll as a basis for the premium, may not now be in position to deny that he was an employe."

It is appellant's contention that George A. Conduitt was an officer and not an employe of the city of New Castle, and therefore that the appellant was not liable under the policy issued to the city.

We do not deem it necessary to enter into a general discussion of this subject. It appears that, at the time the insurance policy was issued, it was the intention of the appellant that the policy should cover city firemen. The appellant and the city contracted with that idea in mind. The salaries of the firemen were taken into consideration in fixing the amount of the premium to be paid appellant for such policy. The appellant accepted and retained such premium, treating the said firemen as employes. It prepared or caused to be prepared the report of George A. Conduitt's death to be filed with the Industrial Board. It prepared and caused the compensation agreement between the city and the dependents of George A. Conduitt to be entered into and approved by the Industrial Board. After approval of said agreement for compensation, the appellant made 104 weekly payments in accordance with the award made by the board. Under the facts and circumstances as disclosed by the record, we are of the opinion that in so far as the appellant is concerned George A. Conduitt was an employe of the city of New Castle.

[6] A mere misconception on the part of the insurer as to the law would not of itself be such a mistake as would authorize the setting aside of the compensation agreement. Especially so where the insurer, after having itself procured the agreement and caused it to be approved, learned of a case which it claims holds that a city fireman is an officer and not an employe of the city. The appellant was not misled in any way by the appellees. We think this defendant should be held to know the character of its business. At any rate, there is no reasonable showing that it did not know as much about the relation existing between the deceased and the city before the settlement of the question as afterwards. Nor does it appear that all the facts coming to appellant's knowledge after the approval of the compensation agreement could not by the same investigation have been learned before.

We find no error in the record.

The action of the Industrial Board is affirmed.

INDIAN CREEK COAL & MINING CO. v. WEHR ET AL.
(No. 10689.)

(Appellate Court of Indiana, Division No. 2. April 30, 1920.)

127 Northeastern Reporter, 202.

MASTER AND SERVANT — EVIDENCE HELD TO WARRANT FINDING DEATH ON TRAIN CARRYING EMPLOYEES OCCURRED FROM HAZARDS OF EMPLOYMENT WITHIN COMPENSATION ACT.

Evidence *held* to sustain a finding of the Industrial Board that the death of an engineer killed in falling from a train carrying employees from a coal mine where he was employed occurred by reason of special

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hazards incident to his work, arising out of and in course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Industrial Board.

Claim by Lucie Wehr against the Indian Creek Coal & Mining Company and others before the Industrial Board. From an award in favor of claimant, the named company appeals. Affirmed.

Chas. E. Henderson and James L. Murray, both of Indianapolis, for appellant.

Chas. S. Batt and Walter S. Danner, both of Terre Haute, for appellee.

McMahan, J. This is an appeal from an award made by the Industrial Board in favor of appellee, Lucile Wehr, on account of the death of her husband, Lloyd Wehr.

Appellant's contention is that the injury which resulted in the death of Lloyd Wehr did not arise out of or in the course of his employment with appellant, but that it was the result of an accident which occurred after he had quit work for the day and while he was a passenger upon a railroad train. Appellant owned and operated a coal mine located about 13 miles from Vincennes and employed about 400 men in and around this mine, all of whom lived in Vincennes. There were no houses at or near the mine where these men could live, and it was necessary that they be transported to and from their work by railroad. This mine was located between 3 and 4 miles away from the Indianapolis and Vincennes branch of the Vandalia Railroad. In 1911, when the mine was opened appellant entered into an agreement with the railroad, under which a spur track was constructed from the railroad to the mine for the purpose of hauling the coal from the mine. In January, 1912, appellant and the railroad company entered into an agreement whereby the railroad company agreed to run a train from Vincennes to the mine and back each work day for the purpose of carrying the miners and employes of appellant to and from their work. The appellant agreed to and did pay the railroad company $500 a month for the use of this train, and deducted $1.25 a month from the wages of each of its employes for the privilege of being carried on this train. The employes were required by appellant to, and they did, sign an agreement whereby they assumed all risk of personal injury or death while riding on said train, or in boarding or alighting therefrom, and released the appellant and all others connected with or concerned in the running of said train from all liability for damages on account of any personal injury sustained while getting on, alighting from, or riding on said train. A copy of said agreements between appellant and the railroad and between appellant and its employes is set out in Vandalia v. Stevens, 114 N. E. 1001, and need not be copied here.

Lloyd Wehr was in the employment of the appellant and three other coal companies. On the 13th of January, 1919, he was working for the appellant. He was a civil engineer, and his duties consisted in surveying the mine and making maps thereof. In doing this work, he worked in and around the mine as well as in the office. The train which carried the miners to and from their work left Vincennes in the morning of each day, and on the return left appellant's mine at 3:45 p. m. On the afternoon of said day, Mr. Wehr had been at work in the office. The regular quitting time for the men working at the mine was 3 o'clock. On this afternoon, Mr. Wehr continued at his work in the office until just about time for the train to leave, when he ran out to catch the train, which was just starting, and a few minutes later he was found on the railroad track between the rails with both legs broken and crushed. His body was found at a point about 200 feet from the office where he had been working, and about 40 feet from the tipple. No one

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saw him at the time he was injured. He was not seen on the train, nor did any one see him get on the train. He was one of the last to leave the office. Mr. Donie, who was the superintendent of appellant, in his testimony said:

"I did not see him get killed, but did see him about two minutes afterwards lying on the track of the main spur that brings the cars from the old I. V. to the mine. * * * The accident happened about 50, 75, or 100 feet from the end of the track at the mine. He was killed by the last or next to the last coach. He fell and was crushed. He had been doing general work around the mine that day. * * * He was the last to get on the train. When I came around he was lying on the ground and the gravel pile prevented us from seeing the accident. * * * He did not have any duties for the mine on the train. His duties in relation to the mining company were all performed at the mine. He was not employed to go different places for the mine. When he left the mine his day's work was over, and he attempted to board the train to go to the place where he was boarding. He left the office just ahead of us, and he had quit his work when he left the office."

Another witness, who was on the train, said it had pulled out about 100 yards when he heard that a man had been run over. He went back and saw Mr. Wehr. He was about 40 feet from the tipple lying between the rails. He was conscious at that time, but did not say he had been run over by the train. His limbs were practically crushed off. He was on the track where the train had just passed. The witness did not see him get on the train and did not know whether any one saw him fall under the train.

The evidence does not disclose who is the owner of the right of way over which the spur runs from the main line to the mine. It is certain, however, that at the point where Mr. Wehr was injured the track was located upon the property of the appellant. Mr. Donie testified that he did not know who owned that track.

Prior to the decision in the Stevens Case, in January, 1917, the train which carried the workmen to and from appellant's mine was operated under the written contract hereinbefore mentioned. Appellant's president and superintendent both testified that, after the decision in the Stevens Case, the train was not operated under the original written contract, although no other contract was ever entered into between appellant and the railroad company. Appellant continued to and at the time of Mr. Wehr's death was paying the railroad company $500 a month to operate this train. During part of the time the appellant deducted $1.50 a month from the wages of each of its employes for the privilege of riding on the train. This was afterwards changed to $1.25 a month. If the workmen had been required to pay the regular fare which amounted to 44 cents each way, it would have amounted to $22 a month, and appellant could not have secured men to operate its mine. It was cheaper for the appellant to guarantee the $500 per month than to provide homes for the men at the mine.

While the president of appellant testified that the agreement with the railroad was abrogated after the decision in the Stevens Case, he also testified that no other or different agreement was thereafter entered into. The train was operated the same way and on the same terms, after the decision in the Stevens Case, as it was before that decision. It is evident that this train was being run for the benefit of appellant; that appellant had agreed to pay, and at the time of the injury to Mr. Wehr was paying, the railroad company $500 a month for the train, and in order to recoup itself in whole, or in part at least, deducted from $1 to $1.50 a month from the wages of its employes, and issued tickets to them, which entitled them to ride on this train. These tickets were furnished by the railroad, but were not punched or taken up by the conductor on the train.

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In addition to the facts hereinbefore stated, the evidence clearly shows that the train which Mr. Wehr was intending to get on was furnished by appellant for the sole purpose of getting its workmen to and from their place of work, and that it was the only way of getting them to their work or getting them to their homes after their day's work was done. It was necessary for appellant to have this train in order to get its men to the mine, and it was furnished by appellant for that purpose.

At the time Mr. Wehr was injured, he was leaving his work, but was yet on the premises of appellant. Whether in running to catch the train he stumbled over the pile of gravel, or whether he was attempting to get on the train and slipped and fell, is not disclosed by the evidence. But it is shown by the evidence that he was on the way from the office to the train which was furnished by appellant to carry him and appellant's other workmen to their homes, and that in attempting to take the train he was injured to the extent that he died a few hours later. He was on the premises of appellant, where he not only had a right to be, but where it was necessary for him to be in order to get on the train which appellant had furnished and which it expected and intended he should take in order to get to and from his work. In attempting to reach this train, he was injured. How or why he was injured is not shown, but it was caused by one of the instrumentalities furnished by appellant and was one of the accidents reasonably and fairly growing out of appellant's business and in the course of the employment of Mr. Wehr.

It is frequently difficult to determine whether an injury is suffered by an accident arising out of employment by applying the standard of some other case. Each case must be considered from a consideration of the particular facts in that case. In the case at bar, we are impressed that the accident arose from a hazard occasioned by the conduct of appellant in the operation of its mine.

In Re Stacy, 225 Mass. 174, 114 N. E. 206, an icehouse laborer on his way home from work was drowned by breaking through the ice while crossing a pond in the control of his employer: crossing the pond on the ice being the reasonable and customary way for him to reach his home, and the way the other employes living in that direction regularly took in reaching their homes. In affirming an award, the court in that case said:

"While the employe's work for the day had been finished and he was on his way home at the time of the fatal accident, still it is settled that an injury to a workman may arise out of and in the course of his employment even if he is not actually working at the time of the injury, * * * The finding that the pond was in the control of the employer and that crossing over it upon the ice was the 'reasonable and customary way' for the deceased to reach his home, and that he and other employes who lived in the same direction 'crossed it this way regularly,' warranted the further finding that the injury occurred in the course of the employment. It could also have been found that the death of the employe was due to his employment as a contributing proximate cause, incidental to the nature of the work in which he was engaged. There was evidence from which the board could have found that Stacy's death occurred by reason of the special hazard incident to the work, which it was his duty to perform."

The same court, in Re O'Toole, 229 Mass. 165, 118 N. E. 303, said:

"If the employe is injured in going to or returning from his work upon the master's premises, or on premises available for the purpose, or if during intervals of leisure which occur in the course of his employment he is injured, he may still be within the scope of his employment and entitled to the benefits of the act."

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We think it is clear from the evidence in this case that the injury and death of Mr. Wehr occurred by reason of the special hazards incident to the work which it was his duty to perform, and that the finding of the Industrial Board that the same arose out of and in the course of his employment is sustained by the evidence, and is not contrary to law.

The award is affirmed and increased 5 per cent.

BUTKOVITCH v. CENTERVILLE BLOCK COAL CO. (No. 32418.)

(Supreme Court of Iowa. May 4, 1920.)

177 Northwestern Reporter 479.

11. MASTER AND SERVANT—EVIDENCE OF PREVIOUS REPAIRS BY MINER EMPLOYED BY OPERATOR REJECTING COMPENSATION ACT COMPETENT ONLY ON ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE, DEFENSES ABOLISHED.

That defendant's foreman sent plaintiff to fix the mine entry in which he was subsequently injured, and plaintiff reported that he had taken down the rock, and that it was all right, bore only on the questions of assumption of risk and possibly contributory negligence, which under Workmen's Compensation Act, § 2477m (c) 1—4, do not prevent liability, unless the negligence was willful and intentional, where defendant has rejected the provisions of that law as to compensation for injuries.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

Appeal from District Court, Appanoose County; D. M. Anderson, Judge.

Action at law, brought July 28, 1917, to recover damages for personal injuries sustained February 24, 1915, in an entry of defendant's mine. Trial to a jury, and verdict and judgment for plaintiff for $500. Defendant appeals. Affirmed.

Howell, Elgin & Howell, of Centerville, for appellant.

John T. Clarkson, of Albia, and Wilson & Smith, of Centervile, for appellee.

PRESTON, J. Plaintiff alleged substantially, that on and prior to February 24, 1915, he was in the employ of the defendant, an incorporated coal company, and had theretofore been engaged in mining coal; that on or about said 24th of February, he was engaged and employed by said defendant as a mule driver, and that while in the performance of his duty on the twelfth south entry off the main entry he sustained an injury by being caught between two cars of coal, which injury was brought about by reason of the coal on the cars catching or colliding with the sides of the entry or haulageway: that at the time of the injury the defendant had given notice rejecting the Workmen's Compensation Law, and that plaintiff had not rejected the law. Defendant denied generally, and alleged that within three weeks prior to the accident plaintiff had made complaint that at the place where he was injured his coal was ribbing at times: that the mine foreman directed plaintiff to take another man and fix the place so it would not rib; that before the accident plaintiff and such other man did go to said place and take down certain rock, an'

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thereafter told the foreman that it was all right; that the foreman relied upon plaintiff's statements, and believed it had been fixed so the sides of the entry would not come in contact with loaded cars of coal, and, relying thereon, the said foreman failed to take any action to make the entry higher and wider; that the condition of the entry was the same at the time of the accident as at the time plaintiff reported he had fixed it. By reason of these matters, defendant alleges that plaintiff was estopped from claiming that the entry was low or narrow at the point in question, and is estopped from claiming that defendant failed to exercise ordinary care in maintaining the entry in a reasonably safe condition; that plaintiff's negligence at and prior to the time of the accident was the proximate cause of the injury; that plaintiff's negligence contributed to his injury, and that the same was brought about altogether by the negligence of plaintiff. These affirmative matters are denied in plaintiff's reply.

The evidence was such, without conflict as to some matters, and at others upon conflicting evidence, from which the jury could have found that defendant's mine was operated on the long-wall system, that is, the plan is so designed that, after the shaft is sunk to the coal strata, entries are driven in the vein of coal for a short distance, then the works are opened up in circular form, and from that point onward all the coal is removed. No pillars of coal are left in as supports; instead, the coal vein being low, refuse material is thrown back and forced up against the roof as tightly as practicable; props placed under the roof lend some support, and, in addition, large blocks of slate are used to build a wall on each side of the roadway, so that the roof gradually settles down upon the roof, props, and gob. In the long-wall system, main entries are maintained, which go directly from the shaft, and from these skip, or cross-entries are constructed; a wall is constructed in these main and skip entries; the skip entries are approximately at right angles from the main entries, though they run more or less in a diagonal or oblique direction to reach the face where the miners are getting out the coal. In this mine in the main haulageway or entry, a mechanical haulage was in use, where the loaded cars were hauled from the parting or switch, and empty cars were taken from the shaft to such parting; mule drivers hauled empty cars from the parting to the face, and loaded cars from the face to the main mechanical haulageway, or the main parting. In the performance of his duty, plaintiff performed the greater portion of his work on and along what is termed the twelfth south skip entry. As the coal was mined and loaded out, the main entries were prosecuted forward, new skip entries were constructed beginning at the main entry and driven at approximately right angles; that these entries were used as haulageways through which coal is hauled by animal power; as new skip entries were constructed, the old ones were abandoned and closed; the coal vein is about 2½ feet thick; under this is about 10 inches of fire clay; over the coal there is five or six inches of draw slate; and above this what is called a clod 5 or 6 inches thick, asd in some places another thin layer of slate. Above all these is a hard strong substance, termed the cap rock, and permanent roof. These substances between the coal and cap rock are ordinarily taken down with the coal and utilized in building walls for the roadway. In the main entries and in the skip entries the fire clay underneath is taken out. In the long-wall system, where the coal is taken out, the roof gradually settles down, some 50 feet from the working face, varying according to the amount of gob thrown back, and props and walls. This settling is sometimes called the squeeze. The settling has a tendency to narrow the entries. There is evidence tending to show that when the settling is going on it is not practicable to maintain the entries 8 feet wide, but after the weight is settled it is not impracticable. According to defendant's testimony, the entry in question was between 8 and 9 feet wide when it was started, and in the neighborhood of 6 feet at the time plaintiff was hurt. Plaintiff's evidence is that it was somewhat narrower than that. It frequently occurs that the roof

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settles so that it is necessary to take down a portion of the cap rock in order to make sufficient height for the mules and cars to pass along. Such was the situation at the place where plaintiff was hurt. What is called a channel in the roof or in the cap rock was made by shooting down a part of it. The place where the cap rock had been shot down, which was immediately over the track, left a space at the high point about 18 inches wide, and at the bottom it was about 45 inches wide, measuring across the entry, just wide enough for the mule to go through; the cars were low. Upon the sides were boards about 6 or 7 inches wide, placed on edge, and from that another board about the same width, forming the wing or flare. After the bed was loaded with the smaller coal, the miners placed large chunks of coal extending to the wings, and it was these large chunks that came in contact with the so-called channel in the cap rock. Because of the narrowness of the channel, and the coal on the top of the car extending above the lower edge of the cap rock, the coal on the cars sometimes came in contact with the cap rock, "ribbing," as the driver termed it, because the haulageway was too narrow. Plaintiff claims that the miners did not always load the cars properly, and that the cars were not all loaded the same width, and, as we understand his evidence, he claims that some of the cars were wider than others. Plaintiff's evidence is that the car in question was loaded even with the bed of the car, and defendant's evidence tends to show that it was loaded so as to extend out beyond. Plaintiff says he never had the miners load coal for him to extend beyond the car. A witness for defendant says that if a chunk of coal would get out an inch and a half beyond the wing, it would catch. Plaintiff says that while he knew chunks had been pulled off before at other places, he did not know this was so at the place he was hurt. Prior to his injury, plaintiff complained to the mine foreman that the cars of coal were ribbing, and requested that the haulageway be fixed. Plaintiff at first worked for defendant as a miner, digging coal, but a few weeks prior to his injury began working as a driver in the twelfth south entry, and other entries in said mine. At the time plaintiff was injured, he was riding between two cars on the hitching or coupling, between the first and second cars. The chunks of coal, coming in contact with the cap rock, forced the chunks back toward the rear car, causing the cars to leave the track, and injured plaintiff. There is a dispute in the evidence as to whether plaintiff was riding in the proper place, and in the proper way, according to the custom, but the jury could have found that the drivers in this mine, and as was the custom in the low coal field, used different means and ways, these varying according to conditions, and that generally the drivers rode the hitching between the first and second cars.

Appellant has assigned 46 errors. Manifestly, we should not take the space to discuss each one in detail. Some are of minor importance. There is some repetition, that is, the same questions are presented in different ways. We shall take up and consider the points which seem to be of sufficient importance.

1. Ten of the errors relate to the question as to whether or not the state mine inspector had determined the question as to whether it was practicable to maintain the entry at the place where the injury occurred at substantially 8 feet in width. The errors relate to the rulings of the court upon objections to evidence, the instructions, and so on. This question is argued at great length, and seems to be one of the main points relied upon. Section 2486*l*, Code Supplement, provides, in substance, that entries in which hauling is being done by draft animals shall be maintained substantially 8 feet in width from one rib or side of the entry or haulageway to the opposite side, etc., provided that the section shall not apply in long-wall work, when the inspector of the district where the mine is located shall determine that it is impracticable to maintain the width of the entry or haulageway as therein provided. The statute

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does not state whether the determination shall be in writing, or otherwise, or how or when it shall be made. Appellant contends that it is not necessary that it should be in writing.

[1, 2] The mine inspector for that district was called as a witness for the defendant, who testified that he was familiar with the statute since its enactment. He testifies that he went through this mine about January, 1914, and that he probably inspected it more closely the first or possibly the second time. This was more than a year before plaintiff was hurt. There may have been settling of the roof after the visit of the inspector. If it had become settled at that time, then, as before stated, the evidence tends to show that it would be practicable to maintain the entries at the required width of substantially 8 feet, but the witness testified that he did not, at any time he was there, make such deermination. This evidence was brought out on cross-examination, and over objection by defendant. We think it was competent, and in view of the direct examination it was proper cross-examination. At this point the trial court instructed substantially that under the undisputed competent evidence in the case the inspector had not determined that it was not practicable to maintain the entries, where plaintiff claims to have been injured, substantially 8 feet in width, and that under the laws of this state defendant was bound to keep said entry at substantially 8 feet in width, and that, if it was less than that, then defendant was negligent in maintaining said entry in said condition, and that such negligence is presumed to have been the proximate cause of plaintiff's injury, and the burden is then upon defendant to overcome such presumption. The defendant offered instructions on this subject, two of which will be set out. There may be some others involving the same thought stated in different ways. Six and eight, so offered, read:

(6) You are instructed that defendant company was not compelled in its long-wall mine to maintain its skip entries any particular width, but was only compelled to exercise ordinary care in maintaining them wide enough to permit the passage of coal that was properly loaded; that is, loaded in accordance with the custom prevailing either in the Hawkeye mine or in this low coal field.

(8) You are instructed that according to the undisputed evidence the Hawkeye mine in question, at the time of the accident, was known as a long-wall mine, and that the skip entries, although commenced at the face and driven 8 feet wide, are subjected to what is known as "squeeze," which results in making the said skip entry more narrow the farther the entry at any given point is removed from the face of coal. The evidence establishes without dispute that this squeezing process cannot be prevented by the company, and, further that the company is not compelled to maintain its long-wall skip entry at 8 feet wide as originally constructed, but is only required to exercise ordinary care in maintaining its skip entry in an ordinarily safe condition, bearing in mind that the company has a right to assume that those using its skip entries, including the mule driver and including the miners who load the coal cars, will so use and so load and so haul, in accordance with the general custom prevailing in the Hawkeye mine at the time of the accident or prevailing in what is known as this low coal field.

Appellant cites 14 Cyc. 236, where a definition of "determine" is given as follows:

"To decide, settle, and to bring to an end; to solve; to come to a decision; to ascertain or state definitely."

See, also, 18 Corpus Juris, 984, and appellant cites State v. Carter, 144 Iowa, 374, 121 N. W. 801, as holding, under another statute, that such words should be construed as to carry out the plain intent of the statute without giving such words a technical meaning. Appellees' contention is that determination, within the meaning of the law and the powers vested in the mine inspector is in effect an order, an adjudication, or, in

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any event, expressed permission to vary from the standards as fixed by the statute, citing Becker v. Jones, 163 Wis. 226, 157 N. W. 789; State v. Police Commissioner, 14 Mo. App. 297; Atlantic Railroad v. U. S. (D. C.) 76 Fed. 186; State v. Board of Education, 35 Ohio St. 368; N. J. Ry. v. Suydam, 17 N. J. Law, 25. It is unnecessary to review and discuss these cases, because, as said, the mine inspector himself testified that he had not determined the matter as contended by appellant. We think the trial court properly instructed that under the undisputed evidence the mine inspector had not made such determination, and that outside of the statement that the evidence is undisputed the instruction is correct under the statute and the law.

[3, 5] But it is thought by appellant that such determination might be found by the jury from the words and actions, or failure of the mine inspector to speak and object at times he inspected the entry in controversy, prior to the accident, and that it was a question for the jury to say whether the inspector had made such determination. Defendant offered instructions on this theory, and that it was the duty of the mine inspector to see to it that the entries were the proper width. It may be said, in passing, that, conceding that such was the duty of the inspector, there was also a duty resting upon the defendant, and, further, that there is no claim, and it could not well be, that the inspector could make any determination that the entries should be so narrow as to not permit cars to pass. There was some evidence admitted on this subject, without objection, but in a negative form. For instance, the mine inspector, Mr. Holland, testified that he does not remember of stating to defendant company that its entries could be maintained at the width of 8 feet; does not remember of saying verbally to defendant's mine foreman, Mr. Hunter, or his superior that it was practicable for them to maintain their skip entries 8 feet wide; never made any complaint to them that their entries were not wide enough, but the court excluded much of the offered testimony by which defendant sought to show by its Foreman Hunter that he went through the mine and this entry, so far as it had been driven, with the mine inspector the first time the inspector went through the mine, and called the inspector's attention to the narrowness of the entry, and that the inspector said it had squeezed in, and that could not be helped in the long-wall system. We are of opinion that this falls short of a definite ascertainment, or determination, that it was impracticable at the time plaintiff was hurt, or at any time, to provide entries of the required width.

[6] 2. It is thought by appellant, and assigned as error, that the court did not strike out on defendant's motion a statement by the mine inspector that, if he had made a determination such as that now in question, "it would have been made in writing, and filed away in the state house with my report." The only objection to the answer was that it was incompetent, but this evidence came on recross-examination, after witness had been interrogated on direct, cross, and redirect examination, as to what he had observed and done, and what he meant by the word "determine." It appears that the witness had not understood some of the questions, and counsel perhaps did not understand the witness. A part of the record on this follows:

"Q. In answer to a question to me, you started to say, and did say, 'If there had been a determination—' and objection was made that it was not responsive to the question I had asked. You may go on and say what you were going to say when you started by saying, 'If there had been a determination.' (Same objection. Overruled. Defendant excepts. Further objection that it cannot be a competent answer with that start, and not calling for a statement of fact.)

"The Court: You didn't give him a very good opportunity to say. (Defendant excepts.) A. If there had been a determination of that kind made by either me or any other inspector—(Defendant moves to strike that out. Sustained. Plaintiff excepts.) A. —by me, then, it

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would have been made in writing and filed away in the state house with my report. (Defendant moves to strike that out as incompetent. Overruled. Defendant excepts.) When I make a determination of that kind I put it in writing."

There seems to have been no objection to the last question and answer. Thereupon counsel for appellant further examined the witness on redirect examination as follows:

"Q. I understand you then. Don't you when you visit a mine, when you look over it and find something out of the way, don't you make suggestions verbally to one of the management, either the pit boss or the operator? A. Most of them are made in writing. Q. Some of your recommendations, you say, you do not make in writing? A. Some that are of no consequence, or of little consequence."

The answer objected to was no more than the witness saying what his practice was, and, under the circumstances, we think there was no error.

[7] 3. It is thought the court erred in not permitting counsel for defendant to ask leading questions of his witness, Holland, the mine inspector, for that the witness was unfriendly to the defendant, or to defendant's counsel. There is nothing in the examination of the witness in chief to indicate any antagonism, but on some of the redirect examinations witness seems to have taken offense at some of the questions propounded by defendant's counsel, and in attempting to require witness to answer Yes or No, and so on. But few objections were made because the questions were leading, and we think it was a matter within the discretion of the trial court.

[8] 4. Several errors are assigned in regard to evidence of subsequent repairs, and the taking down of a part of the cap rock after plaintiff was hurt. These have reference to the evidence and an instruction of the court. It was in connection with evidence as to certain measurements as to width and dates. It is not disputed by appellee that ordinarily such evidence is not competent. But the situation in the instant case is not the same as in See v. Railway, 123 Iowa, 447, 99 N. W. 106, and other cases cited by appellant. In this case, defendant introduced evidence tending to show that the rock had been shot down, and that the haulageway was wide enough to permit cars to pass through, both before and after the injury. There was also evidence on the part of appellant that the rocks did not need to be taken down, and, further, defendant introduced evidence tending to show that the rock could not be taken down. It was claimed by appellant that there was no change of conditions. It was further claimed by appellant that its foreman made measurements at the place where the injury occurred. It was competent, therefore, for plaintiff to show that the roof was taken down, and could be taken down; that there had been a change of conditions which would permit the cars to pass through safely, because of the changed conditions. And it was competent for appellee to introduce evidence tending to show the change of conditions at the time the measurements were made. Beck v. Coal Co., 180 Iowa, 1-19, 162 N. W. 861. The court instructed on this feature of the case as follows:

(14) Evidence has been admitted tending to show that some of the cap rock was taken down from the entry where plaintiff claims to have been injured, after the date of said injury. This evidence was drawn out when a witness was being examined as to what parties had taken down said cap rock and when it was taken down. The fact that the entry was repaired after the accident is not competent evidence that the entry was out of repair and will not be considered by the jury for that purpose. It is competent evidence, however, as to when and who in fact took down the rock, and whether it was taken down before or after measurements were made by the mine foreman.

We think there was no error in regard to this.

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[9, 10] 5. It is thought to be erroneous that counsel for plaintiff referred to the matter just mentioned in argument, and in saying that taking down the rock alone ought to convince the jury that the company knew the place was dangerous, but this was in connection with the argument as to whether it was taken down, before or after, and that defendant claimed it was before the injury. Counsel further said:

"And then we hear the claim that in addition to that Lew Meyers went and took down this rock before this accident, eight or nine days—that was the claim. It was not fixed by Lew Meyers at all before the accident. The only time he ever went there was the second day after Butkovitch was hurt, the next day being an idle day."

Counsel further said in the same connection:

"If he [Hunter, the foreman] knew before that it was dangerous, or was not, why was he asking John Butkovitch to go there and take the rock down in response to John's complaint that the place was too low or too narrow? If he knew it was all right, why didn't he say, 'The cars go through all right; it isn't dangerous'? But instead of that, he admitted by his conduct that the place was too low, was too narrow; that he was maintaining a place that was not safe, and wanted somebody to fix it, but he got too careless, and somebody got hurt, and he is here now trying to throw the responsibility on Buell and Radovich, or the plaintiff."

Under the record we think this was not unwarranted argument, and that it was not prejudicial.

[11] 6. As to the alleged estoppel pleaded by appellant, and which appellee contends is but another way to attempt to apply the doctrine of assumption of risk and contributory negligence, it is true that the mine foreman testified as the defendant had pleaded that plaintiff was sent to fix the entry in question before he was injured, and that plaintiff told the foreman that he had taken down the rock, and that it was all right. But this was denied by the plaintiff. It seems to us the bearing of this evidence would be on the question of assumption of risk, and possibly contributory negligence, in that it is claimed plaintiff knew of the conditions and continued to work after complaint by him. It appears without conflict that plaintiff was an employe of the defendant company, and that he sustained an injury arising out of and in the course of his employment. The defendant had rejected the provisions of the Compensation Law, and to pay compensation for negligence as at common law, as modified by the statute. The Compensation Act—section 2477m (c) 1-4— provides, in substance, that the company shall not escape liability on the ground that the employe assumed the risk, or that he was negligent, unless negligence was willful, and with intent to cause the injury, and so on, and, further, that it shall be presumed that the injury to the employe was the direct result and growing out of the negligence of the employer, and that such negligence was the proximate cause of the injury, and placing the burden of proof on the employer to rebut such presumption. It was alleged in the pleadings that defendant was not within the Compensation Law, and the court properly instructed in reference thereto, and in harmony with the law.

[12] The court instructed, among other things:

(9) The two propositions of negligence or freedom from negligence upon the part of the defendant company to which the evidence in this case has been directed are: First, did the defendant at the place where plaintiff claims to have been injured maintain its entry of the width provided by the laws of this state; and, second, did the defendant at the place where plaintiff claims to have been injured use ordinary care to provide the plaintiff a reasonably safe place in which to do his work? If the defendant has failed to prove by the preponderance or greater weight of the evidence in the case that it was free from negligence in both the particulars stated and which was the proximate cause of plaintiff's injury, then the plaintiff will be entitled to a verdict at your hands. If the defendant has proven by the preponderance or greater weight of

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the evidence in the case that it was free from negligence in both particulars stated, or that such negligence, if not disproved, was not the proximate cause of plaintiff's injury, then the defendant will be entitled to a verdict at your hands.

—and later stated the law in more elaboration as to the two points, and then said in part:

(13) If the defendant has proven by the preponderance or greater weight of the evidence in the case that it was free from negligence which was the proximate cause of the plaintiff's injury, then you need consider the case no further, but return your verdict for the defendant.

We think the instructions of the court cover all points and all defendant was entitled to.

[13] There was evidence of negligence, as well as the presumption of negligence, and it was for the jury to say whether defendant had overcome the presumption. There was no evidence that plaintiff was intoxicated, or that he was guilty of willful negligence. It should have been said before that at the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved for a directed verdict. The motion was properly overruled.

Other minor matters are argued, but such as seem to be controlling have been discussed. Upon a consideration of the entire record, we reach the conclusion that there was no prejudicial error in the trial of the case, and the judgment is therefore affirmed.

Weaver, C. J., and Evans and Salinger, JJ., concur.

FULLER v. WRIGHT et al. (No. 22724.)

(Supreme Court of Kansas. April 10, 1920.)

189 Pacific Reporter 142

(Syllabus by the Court.)

MASTER AND SERVANT—AGREEMENT TO DETERMINE LIABILITY UNDER COMPENSATION ACT HELD NOT AGAINST PUBLIC POLICY.

Where a workman was injured in the service of his employers under such circumstances as to give him reasonable grounds for a cause of action for damages at common law against his employers, or to base a claim against them under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896—5942) if their business was conducted under that act and his employers in good faith believed that they were conducting their business under the provision of that act and had purchased and paid for indemnity insurance pursuant to that belief, although they had not formally filed their election with the Secretary of State until after the workman had been injured, it was not against public policy for the workman and his employers to agree that he should waive his right to sue for damages at common law and to claim compensation under the act in lieu thereof; and the mutual agreement of the workman and his employers that the terms of the compensation act should be used as the basis for determining the respective rights and liabilities of the parties, and to measure the compensation, if any, for the plaintiff's injuries, was a valid, contractural engagement which the court should enforce according to its terms.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

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Appeal from District Court, Geary County.

Action by John Fuller against John K. Wright and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Jas. V. Humphrey and A. S. Humphrey, both of Junction City, for appellant.

Sherman & Landon, of Kansas City. Mo. and L. B. Morris, of Junction City, for appellees.

DAWSON, J. The plaintiff was injured while in the service of the defendants Wright Bros., and they agreed with him that their liability therefor, if any, should be ascertained and determined on the basis prescribed by the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942) and not under the common law.

To that end, the plaintiff filed an action against the defendant, alleging that they were engaged in the business of collecting garbage, under contract with the federal government, on the Ft. Riley and Funston Military Reservation, and that plaintiff was employed by them in that work, and while so employed—

"while standing on an autotruck of the last aforesaid defendants for the purpose of loading the same with garbage, refuse and ashes (the place being on said military reservation), the said truck was by the driver thereof suddenly and without warning to plaintiff started up with a violent jerk, causing plaintiff to be violently thrown to the ground, dislocating, bruising and breaking the bones of his right hip, and resulting in a total permanent disability to plaintiff; said total permanent dsability commencing immediately with said injury and disabling him from earning any wages at any time since."

The petition then recited that, upon the happenings of plaintiff's injury, Wright Bros. informed the plaintiff that their business was conducted under the provisions of the Workmen's Compensation Act, and that they held a policy of insurance issued by the defendant the Associated Employers' Reciprocal, for which they had paid $150, and which covered claims against them by employes injured in their service, and that they and the defendant insurance company would compensate the plaintiff. At the same time, they paid plaintiff the sum of $28 under the liability imposed by the compensation act. The petition further alleged that after many such promises of defendants, and delays without payment, an attorney for the plaintiff asked to see the defendants' insurance policy; and this attorney, having examined it, expressed a doubt as to whether the defendants' business came under the scope of the compensation act without an express election of the defendants to place their business under its provisions, and the attorney for plaintiff informed defendants of plaintiff's intention to begin a common-law action for damages. As an inducement to plaintiff to refrain from commencing such common-law action, the defendants agreed to file their election with the Secretary of State to come under the compensation act, and that their election should be considered as of a date prior to plaintiff's injuries, and that plaintiff could proceed against them under the act. Accordingly, this offer was agreed to by plaintiff; and the defendants Wright Bros. filed their election to come under the act, which election recited:

"The undersigned, J. K. Wright and J. E. Wright, as partners under the name of Wright Bros., herewith declare that they elect to accept under the Workmen's Compensation Act, * * * and they herewith declare that this acceptance relates back to September 9, 1918, on which date they had established relations with their employes of said business and with a liability insurance association on the basis of said business being under said act."

The petition also alleged that the defendant Associated Employers' Reciprocal, at the time of writing the insurance policy for Wright Bros.

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represented to them and induced them to believe that their business was under the compensation act; and at that time the insurance company obligated the Wright Bros. to permit it to control the settlement of claims for injuries to employes and to grant to it the exclusive right to settle or negotiate for a settlement; and that the insurance company, in this case, agreed to investigate plaintiff's accident and injury and to pay any claim for loss, and that it assumed control of all proceedings ensuing therefrom, and thereby substituted itself for its codefendants in all the duties arising from said accident and injury.

The petition continues:

"Sixth. * * * Further plaintiff says that the said Wright Bros. on the occurrence of said accident gave immediate written notice thereof to their said codefendant, and thereupon the said Associated Employers' Reciprocal informed said Wright Bros. that it would take charge of and adjust said case, and thereafter it proceeded to negotiate with plaintiff for a settlement, and requested him to submit in writing his claim under the Workmen's Compensation Law, which plaintiff did.

"Seventh. Plaintiff further says that he has wholly failed to agree with said defendants or either of them for a settlement of his claim for compensation; that on the 3d day of July, 1919, plaintiff notified, in writing, each of said defendants that he consented to an arbitration of his said claim and requested each of said defendants to consent to such arbitration, but that said defendants and each of them refused such arbitration; that the said defendants, Wright Bros., refused such arbitration only because they were directed and ordered so to do by their codefendant; that the said Associated Employers' Reciprocal insist that their codefendants shall not settle nor pay plaintiff's said claim under penalty of losing their said insurance, and that it (Associated Employers' Riciprocal) assumes exclusive control of the disposition that shall be made of said claim, and will pay all expenses arising from the litigation thereof and any judgment that may result therefrom in favor of said plaintiff."

A copy of the contract of insurance, and of the Wright Bros.' election to come under the compensation act, were attached to plaintiff's petition. Plaintiff prayed for compensation and other proper relief.

Defendants' demurrer to this petition was sustained, and this ruling is here for review.

With much that was said by the trial court in its written opinion on the demurrer, and by counsel for the defendants, we are inclined to agree. The defendants could not be subjected to an action under the compensation act merely by filing an election to come under that act and dating that election back to a date prior to plaintiff's accident. When that accident occurred the rights of plaintiff and the liabilities of his employers were fixed. Those rights could not be altered merely by the subsequent election of defendants. But while we concede this, that proposition does not dispose of this case. The plaintiff and his employers had perfect liberty to settle, compose, and adjust the matter in any lawful and honorable manner. Plaintiff believed he had a cause of action against his employers under the common law. His employers believed they were under the compensation act, and had been induced to that belief by the defendant insurance company. The insurance company obviously believed it also, for it accepted the Wright Bros.' money for a policy which specifically covered the subject; and in consideration of $150 paid to it by Wright Bros., they did—

"insure and indemnify the subscriber (herein called the assured) against legal liability imposed by the Workmen's Compensation Act or Acts of the states named in said schedule for bodily injuries accidentally sustained (whether resulting in death or otherwise) which may be suffered

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or alleged to have been suffered by any employe or employes of the assured, to whom he may be liable under said Workmen's Compensation Act or Acts while engaged in any of the assured's work specified in said schedule. * * *

"Description of work to be covered: Garbage collecting, refuse and ashes (excluding garbage reduction or fertilizer plants). Pay roll for 'Comp' coverage to include drivers and drivers' helpers, also chauffeurs and chauffeurs' helpers."

While the Wright Bros. were not under the act until and after the time they had filed their election to conduct their business, under its terms (Laws 1917, c. 226, § 1), the agreement between the parties that their respective rights and liabilities should be settled and determined according to its terms was a perfectly valid agreement. The parties could have lawfully agreed to settle the matter by arbitration, or by any reasonable means they might agree upon. Nothing is more common nor more commendable than honorable and just agreements, amicable settlements, and similar stipulations to avoid or minimize litigious controversy. Even when litigation is commenced, stipulations are permissible to shorten or eliminate certain matters of fact not seriously in dispute although tedious or expensive to prove; and the courts encourage a willingness on the part of litigants to forego rights which could perhaps be established in a thoroughly contested lawsuit. In Dubbs v. Haworth, 102 Kan. 603, 606, 171 Pac. 624, 625, it was said:

"It is not required of a creditor that he shall demand the uttermost farthing which may be technically due him. He may be satisfied with less than his just due; and if, in fact, he honestly believes that more is due him than he is asking to be paid for, his debtor has no just complaint that the creditor, upon the debtor's request, specifies more items than the aggregate amount for which the creditor is insisting on payment. Modesty of demands is ordinarily a virtue, not a fault."

It would hardly be asserted that, if the plaintiff and defendants had agreed to refer the question of defendants' liability to the grievance committee of the Teamsters' Union and to abide by its decision, such agreement would be void. It would be valid. Such illustrations from daily life might be multiplied. Why, then, might not the parties agree that the provisions of the Workmen's Compensation Act should be taken as a basis for determining the rights and liabilities of the plaintiff and his employers? No rule of public policy would forbid. Public policy is a creature of the Legislature, and it has declared in favor of this identical policy—as far as it feels that it can constitutionally go. Were it not for some doubt about its power to do so, it would not leave it to the election of such employers as defendants as to whether they would conduct their business under the compensation act or not. The Legislature would do as it does where the hazardous nature of the business cannot be disputed, and would have placed it absolutely under the act. Where the business is not inherently hazardous, the Legislature has made the application of the act optional and contractural. The trial court was persuaded that some evil might arise if employers might fix the time when their business should be considered to be conducted under the act independently of the actual date of filing their formal election with the Secretary of State. Probably so, if such were done in prejudice of their workmen's rights; but we can discern no evil which can flow from permitting the employer and his injured workman to agree about the matter.

In Shellberg v. McMahon, 98 Kan. 46, 49, 50, 157 Pac. 268, this court upheld an agreement where one of the parties to a controversy was to bring a suit and the other was to make no defense thereto. It is not uncommon for parties to waive certain defenses, or to estop themselves by their conduct from setting up certain defenses, which would otherwise be valid; and it is a common and good practice for parties to stipulate as to certain controvertible features of a lawsuit so as to

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limit the issues of fact or of law needing the trial court's determination. Atchison, T. & S. F. R. Co. v. Starkweather, 21 Kan. 322; Groat v. Pracht, 31 Kan. 656, 3 Pac. 274; Finley v. Funk, 35 Kan. 668, 12 Pac. 15; Brooks v. Hall, 36 Kan. 697, 14 Pac. 236; Lanphear v. Ketcham, 53 Kan. 799, 37 Pac. 119; Lewis v. Telephone Co., 95 Kan. 136, 139, 147 Pac. 1122, Ann. Cas. 1916B, 1035; Shellberg v. McMahon, 98 Kan. 46, 49, 50, 157 Pac. 268; 8 Cyc. 516-522; 9 Cyc. 345, 346; 5 R. C. L. 878, 901.

It must be held that the agreement to use the compensation act as the basis for measuring the defendants' liability, rather than the common law, violated no rule of public policy.

It is not so clear from the pleadings that the defendant insurance company would be bound by the result which may flow from the determination of the cause between the plaintiff and his employers upon their agreement that the compensation act shall govern their respective rights and liabilities. That is to say, it is not altogether clear whether the insurance company was a party to that agreement. But with commendable frankness the learned counsel for the insurance company admitted in the oral argument in this court that his company would feel itself obliged to pay any liability which might be adjudged against Wright Bros. whether that liability were determined to exist under the compensation act or under the common law.

That point being conceded, the judgment will be reversed, and the cause remanded, with instructions to overrule the demurrers interposed by the defendants and to proceed with the cause.

All the Justices concurring.

GRAY v. NEW ORLEANS DRY DOCK & SHIPBUILDING CO.
(No. 23150.)

(Supreme Court of Louisiana. June 30. 1919. On Rehearing. Feb. 2, 1920. Rehearing Denied March 1, 1920.)

84 Southern Reporter 109.

(Syllabus by Editorial Staff.)

On Rehearing.

6. MASTER AND SERVANT—ACCEPTANCE OF BENEFITS UNDER WORKMEN'S COMPENSATION ACT HELD NOT TO ESTOP EMPLOYEE FROM ASSERTING COMMON-LAW REMEDY.

Where an injured employee of a dry dock company accepted payments conceded to be due on being assured that acceptance would not be a waiver of his rights, and the only question was whether his claim was governed by the Workmen's Compensation Act or not, the acceptance of such benefits will not be construed a waiver of his right to a common-law remedy to which he was entitled because engaged in work of an admiralty nature.

(For other cases, see Master and Servant, Dec Dig. § 358.)

7. MASTER AND SERVANT—PAYMENTS UNDER WORKMEN'S COMPENSATION ACT HELD NOT A COMPROMISE AND SETTLEMENT.

Where it was conceded by the defendant employer and the insurer that plaintiff was under the Workmen's Compensation Act entitled to payments received, and the only question was whether his disability was total or

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not, plaintiff's acceptance of payments for 19 or 20 weeks did not, where he was assured that it was no waiver of his rights, amount to a compromise and settlement precluding him from having recourse to the common-law remedy to which he was entitled, because at the time of his injury he was engaged in work of a maritime nature.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

Provosty, J., dissenting.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by John A. S. Gray against the New Orleans Dry Dock & Shipbuilding Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward Rightor, of New Orleans, for appellant.

McCloskey & Benedict and H. B. Curtis, all of New Orleans, for appellee.

PROVOSTY, J. Plaintiff sues in damages for injuries received while in the employ of the defendant company, and in the alternative sues under the Workmen's Compensation Act.

Defendant recognized its liability to plaintiff under said act, and had been paying plaintiff $10 a week for 25 weeks when this suit was filed.

Defendant pleads that plaintiff, having thus agreed to receive payment under said act, and actually received many payments, is estopped from contending that defendant's liability is not under said act, but for damages as for ordinary tort.

In Summers v. Woodward, Wight & Co., 142 La. 241, 76 South 674, this court said:

"Where an employer pays the wages of an injured employe in full for a number of weeks, and subsequently in part, and, holding a policy of insurance, taken out with express reference to the Burke-Roberts Employers' Liability Act (Act No. 20 of 1914), obtains receipts showing such payments as for wages to which the employe was entitled under the Louisiana Workmen's Compensation Act, upon which it obtains reimbursement from the insurance company, the question whether the injury of the employe entitles him to compensation under the act will be regarded as eliminated."

We think the estoppel well pleaded. Counsel for plaintiff seek to avoid it by contending that plaintiff was assured by defendant that he would be waiving none of his rights by receiving these payments. If any such assurance was given, it was after plaintiff had already been receiving the payments, and the meaning of it was simply that by receiving the payments the plaintiff would not be waiving his right to claim compensation as for total liability. There was no question between the parties at that time of plaintiff having, or pretending to, any other rights.

Defendant does not contest that plaintiff is entitled to compensation as for total disability; that is, to $10 a week for 400 weeks.

The judgment appealed from, which was for $15,000 damages, is therefore set aside, the plea of estoppel is sustained, and it is now ordered, adjudged, and decreed that the plaintiff, John A. S. Gray, have judgment condemning the defendant, New Orleans Dry Dock & Ship Building Company, to pay him $10 each week for 400 consecutive weeks, less the payments already made, and that the defendant pay the costs of the lower court and the plaintiff those of the appeal.

Monroe, C. J., takes no part, not having heard the arguments.

O'Neill, J., dissents.

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On Rehearing.

O'NEILL, J. Defendant appeals from a judgment awarding plaintiff $15,000 damages for personal injuries, subject to a credit of $240 paid before the suit was filed. In answer to the appeal, plaintiff prays that the amount of the judgment be increased to $20,000.

He fell from a scaffold and was seriously injured while working in the employ of the defendant company as a carpenter on the dredge-boat Dixie, belonging to the board of commissioners of the port of New Orleans, and undergoing repairs in defendant's dry dock in the Mississippi river at New Orleans.

After the accident, the defendant through an indemnity company (by whom defendant was insured against employers' liability for such accidents) made weekly payments of compensation at $10 a week for 24 weeks, assuming that plaintiff was entitled to compensation under the Employers' Liability Act, the Act No. 20 of 1914 (page 44).

When plaintiff was wll eough to get about, he called upon the president of the dry dock company, and asked what effect his receiving the payments of compensation would have upon his legal right in the premises; and, having called in the agent of the indemnity company, and in presence of the latter, the president of the dry dock company assured plaintiff that he was entitled to compensation at $10 a week during his disability to work, and that his acceptance of the payments would not be construed as a waiver or abandonment of any claim that he might have against the dry dock company. The president of the dry dock company and the agent of the indemnity company were then of the opinion that the case was govered by the Employers' Liability Act, and not by the general law of torts; and it appears that the only question in their mind was whether plaintiff was entitled to compensation for permanent total disability or only for temporary total disability. There was no doubt or dispute that plaintiff had suffered total disability. The president of the defendant company and the agent of the indemnity company, therefore, conceded that if plaintiff's disability was permanent, he was entitled to the $10 a week for 400 weeks; if only temporary, he was entitled to the $10 a week during the period of disability, not, however, beyond 300 weeks.

Thereafter, having indorsed and cashed 19 or 20 of the voucher checks of $10 each, plaintiff consulted an attorney, who at first was also of the opinion that the case was governed by the Employers' Liability Act, which, if applicable, would exclude any and all other rights or remedies. The attorney therefore wrote to the agent of the indemnity company, requesting an acknowledgment of liability for $4,000, for permanent total disability. The agent replied that the company would continue the payments of $10 a week until medical advice would warrant a discontinuance of the payments, or until the obligation would be canceled by the statute. Plaintiff's attorney replied that he was not satisfied with the attitude assumed by the indemnity company; that, if the company would admit liability for permanent total disability, he "supposed" that he would "have to accede thereto," but that, unless the company would acknowledge liability for permanent total disability, he, the attorney for plaintiff, would submit the matter to the court for determination. In the meantime, on his attorney's advice, plaintiff refused to cash the remaining four or five checks received from the indemnity company.

Thereafter, on the opinion expressed by the Supreme Court of the United States, in the case of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37, Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, plaintiff's attorney concluded that the case was not governed by the Employers' Liability Act; and he brought the suit under article 2315 of the Civil Code, the general law of damages arising ex delicto. In the alternative, he pleaded that, if the court should hold that the Employers' Liability Act governed the case and excluded all other rights and reme-

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dies, then, and in that event only, plaintiff should be awarded compensation in the sum of $4,000.

The defendant pleaded: (1) That the petition did not set forth a cause or right of action; and (2) that the court was without jurisdiction ratione materiæ. These pleas being overruled, defendant answered, admitting liability under the Employers' Liability Act for $10 a week for 400 weeks, unless plaintiff's disability should come to an end sooner. In support of the contention that defendant's liability was limited to the compensation allowed by the Employers' Liability Act, defendant alleged, in the answer to the suit, that the dredgeboat Dixie was not afloat at the time of the accident, but was then in a dry dock, a fixed structure, contrived for the purpose of taking ships out of the water for repairs, having no means of propulsion, not designed for navigation and permanently moored, "and that neither was the said dry dock nor said vessel while it was contained therein, nor the plaintiff while working upon said vessel, within the maritime jurisdicton of the Unted States, but was within the jurisdiction of the state of Louisiana." Averring that the plaintiff had received and cashed the checks paid for compensation under the Employers' Liability Act, defendant pleaded that plaintiff was estopped and debarred from denying that the case was governed by the statute, and pleaded that plaintiff could not maintain an action for tort without having returned the amount which he had received for compensation under the Employers' Liability Act. In the alternative, and in the event the court should hold that the plaintiff was not bound by the Employers' Liability Act, and that the statute did not govern the case, defendant pleaded and averred that plaintiff's injuries were caused by his own fault and that of his fellow servants, and without any fault or negligence on the part of defendant. The prayer of defendant's answer was that plaintiff's suit be dismissed at his cost, and that plaintiff be ordered to continue to take, as he had theretofore taken, and as defendant had always shown a willingness to pay, the sum of $10 a week for 400 weeks, unless plaintiff's disability should come to an end sooner.

Opinion.

Defendant's answer limits the issue to the question whether plaintiff's remedy is, under article 2315 of the Civil Code, the general law of damages arising ex delicto, or is restricted to a demand for compensation under the Employers' Liability Act. The same issue was raised by the plea or exception of no cause or right of action; for, if the Employers' Liability Act governs the case, section 34 of the statute excludes all other rights and remedies, viz:

"That the rights and remedies herein granted to an employe on account of a personal injury for which he is entitled to compensation under this act shall be exclusive of all other rights and remedies of such employe, his personal representatives, dependents, relations, or otherwise, on account of such injury."

[1, 2] The plea to the jurisdiction of the state court, ratione materiæ, is without merit, and the answer to the suit was, in effect, an abandonment of the plea, because if, as defendant contends, the location of the dredgeboat Dixie was not within the admiralty jurisdiction at the time of the accident, plaintiff's only remedy was to proceed in the state court, and in such case his right and remedy would be controlled by the state statute, the Employers' Liability Act. On the other hand, if the Dixie was, notwithstanding she was in a dry dock, within the admiralty jurisdiction at the time of the accident, plaintiff is entitled to the common-law remedy in the state court.

It is not contended by the defendant that the dredgeboat Dixie was not a ship or vessel within the meaning of the admiralty law, or was not subject to admiralty or maritime jurisdiction, by reason of the purpose for which she was constructed or used, or the business in which

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she was engaged. The only fact or reason stated by defendant for contending that the Dixie was not within the admiralty or maritime jurisdiction at the time of the accident is that the boat was then out of the water, in a floating dry dock. The answer to that contention is that, although the floating dry dock itself was not subject to admiralty and maritime jurisdiction (Cope v. Valette Dry Dock Co., 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501), it is well settled that a ship or vessel while undergoing repairs in a dry dock is subject to the admiralty and maritime jurisdiction. The United States Supreme Court has so decided, twice, with regard to a vessel locked in a dry dock consisting of an artificial basin from which all the water had been pumped out. See Perry v. Haines (The Robert W. Parsons) 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73; and Simmons v. Steamship Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907. In the latter case it was held that a court of admiralty had jurisdiction of a libel for salvage for services rendered by tugboats in extinguishing a fire communicated from the shore to a vessel undergoing repairs in a dry dock; and, in the former case cited, the ruling was that the admiralty jurisdiction of the federal courts extended to the enforcement by proceedings in rem of a lien for repairs made upon a vessel in a dry dock. A contract for repairs to a vessel in a dry dock being a maritime contract, so also must the work of the employe engaged in making the repairs be maritime in its nature. On this subject, see, also, Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, and Southern Pacific Co. v Jensen, 244 U S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann Cas. 1917E, 900.

[3-5] Clause 3, § 24, and section 256, of the Judicial Code (36 Stat. 1091, c. 231 [U. S. Comp. St. §§ 991 (3), 1233]), conferring upon the courts of the United States jurisdiction in all civil causes of admiralty and maritime jurisdiction, reserves to suitors in all cases the right of a common-law remedy where the common law is competent to give it.

The United States Supreme Court decided, however, in the case of the Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann Cas. 1917E, 900, that the clauses in the Judicial Code, "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it," did not save or reserve to suitors, in such cases, the rights and remedies afforded by an Employers' Liability Act, or Workmen's Compensation Law, of any state.

The case of the Southern Pacific Co. v. Jensen was decided on the 21st of May, 1917. By an act approved October 6, 1917 (40 Stat. 395, c. 97 §§, 1, 2, Comp. St. 1918, Comp St. Ann. Supp. 1919, §§ 991 (3), 1233, Fed. Stat. Anno. Supp. 1918, pp. 401, 414), Congress directed that both clauses of the Judicial Code be amended by adding to the expression "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it" the words "and to claimants the rights and remedies under the workmen's compensation law of any state."

The amendment, however, is not pertinent to this case, because the cause of action arose, and in fact the suit was filed, before the act of October 6, 1917, was adopted. It was decided by the Supreme Court of the United States, in Peters v. Veasey, 251 U. S. 121, 40 Sup. Ct. 65, 64 L. Ed. —, on December 8, 1919, that the amendment was not applicable to a cause of action that had arisen when the amendment was adopted. Therefore, whether Congress, by amending the clauses of the Judicial Code so as to save to suitors in all cases the right of a common-law remedy where the common law is competent to give it, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state," intended to give to the Legislature of each and every state the

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power to deprive suitors in such cases of the right of a common-law remedy, by enacting in a workmen's compensation law a clause excluding all other rights and remedies, is a question which we need not decide in this case.

The work in which plaintiff was engaged at the time he was injured was maritime in its nature; his employment was a maritime contract, and his claim for damages was enforceable in the admiralty and maritime jurisdiction. For that reason, before the passage of the act of Congress of October 6, 1917, the Employers' Liability Act was not pertinent, and did not deprive the plaintiff of the right of a common-law remedy. We say "common-law remedy" because article 2315 of the Civil Code of this state is only an embodiment of the common-law right of action for tort, viz.:

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it."

The reason given in Southern Pacific Co. v. Jensen for holding, before the amendment of October 6, 1917, that the saving clauses in the Judicial Code did not save to suitors the rights and remedies afforded by the workmen's compensation law of any state is not pertinent to the system of civil law prevailing in this state, where the rights that prevail at common law are codified and the remedies are substantially the same.

[6, 7] There is no merit in defendant's contention that plaintiff was estopped by his conduct in accepting and retaining the payments of compensation for the several weeks of total disability. The defendant, or rather the indemnity company, paid only what was then conceded to be due to plaintiff, and what is yet conceded to have been due him at that time, regardless of what might yet be due. The defendant or the indemnity company was in no worse position, and is yet in no worse position, for having made the payments, even though the defendant and the indemnity company believed then that each payment was all that was due at the time. A debtor cannot discharge his debt by paying a part which he concedes to be due, unless the creditor agrees to accept the part in satisfaction of the whole debt. Plaintiff's claiming all that he believes is due him now is not inconsistent with his having received the part which defendant conceded was then due. There is therefore no element of estoppel in this case. Nor can the plea be sustained as one of compromise or settlement. A transaction of compromise must be mutually accepted by the parties, for the purpose of preventing or putting an end to a lawsuit, in preference to the hope of either party of gaining and the risk of losing. To be effective, such agreement must be reduced to writing. R. C. C. art. 3071. And the Employers' Liability Act (section 17) requires the decree of a competent court, on the joint petition of the employer and employe, verified by both parties, to settle or compromise a claim for compensation. There was no settlement, nor agreement of settlement, between the plaintiff and defendant in this case, because, while the indemnity company was making payment of what defendant conceded was due at the time, there was a dispute as to the total sum that would have to be paid in the future; which dispute was not settled when the suit was filed. Defendant relies upon the decision in Summers v. Woodward, Wight & Co., 142 La. 241, 76 South. 674, in support of the argument that the plaintiff is estopped and bound to abide by the Employers' Liability Act. But the ruling in the case cited is not pertinent to this case. The ruling was that the employer had, by making payments of compensation under the Employers' Liability Act, and by accepting reimbursement or indemnity from the insurance company, admitted liability under the statute. The question presented in that case was whether the defendant owed compensation under the Employers' Liability Act or owed nothing. The question presented now is whether the defendant owes compensation under the Employers' Liability Act or owes full indemnity under the general law of damages

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arising ex delicto. In the case cited, the admission made by paying indemnity under the Employers' Liability Act was an admission against the payor's interest. In the case before us, the admission is invoked as evidence in favor of the defendant who made the admission. In the case cited, the fact that the defendant had made payments of compensation under the Employers' Liability Act was not held to be an estoppel, technically speaking, but was held to be an admission that the business in which the defendant was engaged at the time of the accident was a hazardous business or occupation, within the purview of the Employers' Liability Act; for that question of fact was the only question at issue in the case.

[8, 9] Defendant's counsel has contended, in oral argument and in the briefs filed, that the plaintiff cannot recover damages under the law of the state because the measure of damages is controlled by the admiralty and maritime law. The answer to the argument is that there was nothing in plaintiff's pleadings that interfered with the defendant's invoking and provision of the admiralty and maritime law limiting the measure of indemnity or damages. No such limitation has been invoked; and we know of none that conflicts with the measure of damages under the state law in such cases. If the plaintiff in this case had been a seaman or member of the Dixie's crew, and if he were therefore suing the owners of the vessel for damages or indemnity for the injury he suffered, the liability would be limited to the seaman's wages, at least to the end of the voyage, and the cost of maintenance and cure of the injured seaman, unless the injury had resulted from unseaworthiness of the vessel, or a failure to supply and keep in order her proper appliance. In the case of a seaman, we would be constrained to hold, under the admiralty and maritime law, that all members of the crew of the vessel, except perhaps the master, are fellow servants, and that a seaman could not recover for injuries sustained through the negligence of another member of the crew, beyond the expense of maintenance and cure of the injured seaman. But the plaintiff in this case was not a seaman or member of the boat's crew, and is not suing the owners of the vessel; and we know of no special rule of admiralty or maritime law that takes his case out of the general rule that, in admiralty, the award of damages rests largely in the sound discretion of the court, under all the circumstances of the case. See the Steamer Max Morris v. Curry, 137 U. S. 1-15, 11 Sup. Ct. 29, 34 L. Ed. 589, and the decisions there cited. The same doctrine prevails in the law of this state, in the provisions of article 1934 of the Civil Code, that, in the assessment of damages for an offense or quasi offense, although the damages are not appreciable in money, compensation or indemnity may be allowed for an amount largely within the discretion of the judge or jury.

Though it must be conceded that the provisions of the Judicial Code, saving to suitors, in cases like this, the right of a common law remedy, did not increase or diminish the liability fixed by the admiralty and maritime law, we know of no strict measure of liability for a case like this, in the admiralty law; and the result would be the same, therefore, whether the liability of the defendant be measured by the admiralty or state law.

[10] There is no dispute about any of the important facts of the case. Plaintiff was standing upon a temporary scaffold at the bow of the boat, fitting a strip of lumber under the edge of the deck. The foreman of the work, standing on the dry dock, a few feet away from the scaffold, ordered a crew of men to pull a bilge block from under the bow of the boat, close by the foot or stanchion of the scaffold. The bilge block consisted of three pieces of timber fastened together, forming a solid block of wood measuring 12 in. x 40 in. x. 48 in., weighing more than a thousand pounds and required six men to handle it. The scaffold collapsed immediately when the bilge block was moved. There is no doubt that the moving of the bilge block caused the scaffold to collapse,

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either by bumping against one of the stanchions or by otherwise disarranging the structure below. The plaintiff was then turning round or reaching for a piece of material on the boat's deck, and had no warning of the intention of the foreman to have the bilge block moved. The evidence leaves no doubt that the accident was caused by the negligent manner of moving the bilge block, under orders of the foreman employed by the defendant company. No negligence whatever is imputed to the plaintiff.

[11] It is not seriously contended by appellant that the quantum of damages allowed is out of proportion to the injury suffered. The injury has caused permanent paralysis of the left side of plaintiff's body, has rendered him impotent, and has permanently disabled him for work of any kind. He is 46 years old and has a wife and seven children, with no means of support except the wage of a little girl earning $5 a week. We are not disposed, however, to increase the allowance of damages, where the amount is already unusually large.

The judgment appealed from is affirmed.

Inasmuch as the only question decided or considered on the original hearing of this case was the plea of estoppel, the right is reserved to appellant to make application for a rehearing.

Provosty, J. dissents and hands down reasons.

PROVOSTY, J. (dissenting). The doctrine of this decision appears to me to be that, although, as has heretofore been held, the making of payments under the Employers' Liability Act estops the employer, the demanding and receiving of the payments does not estop the employe, so that, as a practical matter, the employe may go on and receive these payments until he has accumulated enough money to enable him to maintain a lawsuit against the employer under article 2315 of the Code, and if he succeeds in his suit under this article, the payments will be considered as having been made in part payment of the liability under the article, and, if he fails in his suit, the payments will be considered as having been made under the Employers' Liability Act. I dissent.

WILLIAMS et al. v. BLODGETT CONST. CO. (No. 22458.)

(Supreme Court of Louisiana. March 1, 1920.)

84 Southern Reporter 115,

(Syllabus by the Court.)

MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT, MAKING REMEDY EXCLUSIVE, IS CONSTITUTIONAL.

Rulings to the effect that section 34 of Act No. 20 of 1914 (Burke-Roberts Employers' Liability Act), making remedy afforded by that act exclusive, affirmed.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Appeal from First Judicial District Court, Parish of Caddo; R. D. Webb, Judge.

Action by Frederick Williams and others against the Blodgett Construction Company for damages for the death of John Williams, a brother. From a judgment sustaining an exception of no cause of action, and dismissing the suit, plaintiffs appeal. Affirmed.

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John M. Munholland and David I. Garrett, both of Monroe, for appellants.

Fullilove & Scarborough, of Shreveport, for appellee.,

MONROE, C. J. Plaintiffs, five in number, all majors, alleging that they are the brothers and sisters of John Williams, deceased, brought this suit, under the general law, for the recovery of damages alleged to have been sustained by them, by reason of his death, whilst engaged in the discharge of his functions as an employe of the defendant, in the construction of a railway bridge and as the result of defendant's negligence, and they prosecute this appeal from a judgment sustaining an exception of no cause of action and dismissing the suit. The exception is based upon the provision of Act. No. 20 of 1914, known as the "Burke-Roberts Employers' Liability Act," which reads:

"Sec. 34. * * * That the rights and remedies herein granted to an employe, on account of a personal injury for which he is entitled to compensation under this act, shall be exclusive of all other rights and remedies of such employe, his personal representatives, dependents, relations, or otherwise, on account of such injury."

No question of the constitutionality of the statute, of section, thus referred to, is presented by the pleading in the case, and no counsel representing plaintiffs have appeared in this court to urge any such question. We might therefore, perhaps, assume that the appeal has been abandoned. Defendant's counsel have, however, filed a brief in support of the constitutionality of the quoted section, and, since the brief was filed, this court has expressed itself upon the subject as follows:

"We have heretofore considered, and have reconsidered, the question, several times, whether section 34 of Act No. 20 of 1914 is violative of article 6 of the State Constitution, and we adhere to our ruling that the law is not invalid in that respect. See Whittington v. Louisiana Sawmill Co., 142 La. 322, 76 South. 754, Boyer v. Crescent Paper Box Factory, 143 La. 368, 78 South. 596, and Philps v. Guy Drilling Co., 143 La. 951, 79 South. 540."

The writer of this opinion did not concur in the ruling thus made and referred to, and is not now convinced of its correctness. As the organ of the court, however, he expresses the view that it is conclusive for the purposes of this case.

Judgment affirmed.

HADDAD v. COMMERCIAL MOTOR TRUCK CO. (No. 23659.)

(Supreme Court of Louisiana. March 1, 1920. Rehearing Denied April 5, 1920.)

84 Southern Reporter 197.

(Syllabus by Editorial Staff.)

2. MASTER AND SERVANT—DRIVER OF MOTOR TRUCK HELD TO BE OPERATING "ENGINE" OR "MACHINERY" WITHIN EMPLOYERS' LIABILITY LAW; "MACHINE"; "ENGINE AND OTHER FORMS OF MACHINERY."

Where the driver of a motortruck used in his employer's business was killed by falling therefrom, the wheels passing over his body, the death occurred while decedent was engaged in the operation of an "engine and other forms of machinery" within Employers' Liability Law, § 1,

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par. 2, subd. (a), an "engine" being an ingenious or skillful contrivance used to effect a purpose, and is often synonymous with the word "machine"; machinery being any combination of mechanical means designed to work together so as to effect a given end.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Engine; Machine; Machinery.)

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Proceedings under the Employers' Liability Law by Mrs. Osie Haddad, to recover for the death of her husband, opposed by the Commercial Motor Truck Company, employer. From a judgment sustaining an exception of no cause of action after a trial on the merits, plaintiff appeals. Reversed and remanded, with directions.

Murff & Marby, of Shreveport, for appellant.,
Wise, Randolph, Rendall & Freyer, of Shreveport, for appellee.

DAWKINS, J. Plaintiff appeals from a judgment sustaining an exception of no cause of action, after a trial on the merits in this case. The exception had formerly been overruled by another judge of the same court, prior to the trial on the merits.

The action was brought under the Employers' Liability Law, and the petition alleges that the husband of plaintiff was killed while in the discharge of his duties, "driving a motor-truck, the property of said company, on the public road near Grand Cane, La. Her husband was killed by falling from said motortruck, some of the wheels of which passed over his body."

Defendant admits the employment of the deceased, but denies that it is engaged in any of the businesses mentioned or contemplated by the employers' liability statute, or that the said Haddad was performing any service which fell within that category.

Opinion—Exception of No. Cause of Action.

The question of whether or not the petition discloses a cause of action, depends upon the interpretation to be given to the following sentence of subdivision (a) of paragraph 2 of section 1 of Act No. 20 of 1914, to wit:

"Every person performing services arising out of and incidental to his employment in the course of his employer's trade, business or occupation in the following hazardous trades, businesses and occupations: * * *

"The installation, repair, erection, removal or operation of boilers, furnaces, engines and other forms of machinery."

The petition alleges, in addition to the nature of the work which the deceased was performing at the time of his death:

"That her said husband was an employe of the Commercial Motor Truck Company prior to and at the time of his death; said company is a corporation organized under the laws of the state of Louisiana, domiciled at Shreveport, Louisiana, with W. H. Jordan as president; said M. G. Haddad having worked for said company or corporation for some time as a driver of motortrucks, selling and delivering same, and performing any other duties he was called on to do in connection with said company's motortruck business."

The effect of this and the other allegations of the petition is to charge that the defendant was engaged in the handling, selling, operation, and delivery of motortrucks, and the issue therefore is as to whether or not it was operating "engines" or "other forms of machinery," within the meaning and contemplation of the clause of the statute above quoted.

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[1] We think we may take cognizance of the fact that motortrucks are operated or propelled by gasoline engines or motors, which by the use of gasoline produce their own energy or motive power. The driving of such motortrucks necessarily involves the operation of such engines.

"The word 'engine' is defined as an ingenious or skillful contrivance used to effect a purpose, and is often synonymous with the word 'machine.' Within such definition, an electric passenger elevator is an engine. Leafier v. Forsberg, 1 App. D. C. 36, 41." Words and phrases, vol. 3, p. 2395.

An engine, according to the Century Dictionary, is:

"A skillfully contrived mechanism or machine, the parts of which concur in producing an intended effect; a machine for applying any of the mechanical or physical powers to effect a particular purpose; especially a self-contained, self-moving mechanism for the conversion of energy into useful work; as a hydraulic engine for utilizing the pressure of water; a steam, or gas, or air engine, in which the elastic force of steam, gas, or air is utilized."

According to the same authority, machinery is defined as follows:

"The parts of a machine considered collectively; any combination of mechanical means designed to work together so as to effect a given end, as the machinery of a watch, a canal lock; any complex system of means and appliances; any mechanical device to carry on any particular work, or keep anything in action, or to effect a specific purpose or end; as the machinery of government."

[2] There could be but little doubt that if the deceased had been required, in the course of his employment, to operate a stationary gasoline engine on the premises of the defendant, the service would have fallen clearly within the provisions of the Employers' Liability Law, no matter for what purpose its use might have been intended. Can it be said that, because he was required to operate the same character of engine in a self-propelling vehicle, the statute does not apply? We think not. Would the driver of a motorbus for the transportation of freight and passengers be engaged in the operation of an engine or machinery? We think so. Not only does the operation of a motortruck involve the operation of an engine (gasoline), but also the operation of machinery, in its broader sense, as defined by the authority above cited. It involves the operation of the gasoline engine, as a part of the machinery of the truck, which in the ordinary, common, and everyday use of the word is a "machine."

We therefore think that the exception of no cause of action should be overruled.

[3] Inasmuch as the lower court did not pass upon the merits, and the case is before us upon appeal from the judgment sustaining the exception of no cause of action alone, it will be necessary to remand the same for a decision on the merits. Park et al. v. Hughes, Sheriff, et al., 145 La. 221, 82 South. 202.

For the reasons assigned, it is therefore ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby annulled and reversed; and it is now ordered and decreed that the exception of no cause of action filed by defendant be, and same is hereby, overruled. It is further ordered that this case be, and the same is hereby, remanded to the lower court for a decision upon the merits; the costs of this appeal to be paid by the appellee, and all other costs to await final judgment.

Provosty, J., dissents.

O'Neill, J., concurs in the decree.

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BARRY'S CASE.

(Supreme Judicial Court of Massachusetts. Essex. April 1, 1920.)

126 Northeastern Reporter, 894.

1. MASTER AND SERVANT—COMPENSATION FROM ELEVENTH DAY AFTER INJURY HELD PROPERLY AWARDED.

Compensation for injury is properly awarded the employee from the eleventh day after the injury to the date of the first hearing before the Industrial Accident Board, to continue during the period of total incapacity.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

2. MASTER AND SERVANT—ACCIDENT BOARD'S FINDING OF TOTAL INCAPACITY CONCLUSIVE.

The extent and permanency of an injured employee's disability is a question of fact, and, when supported by evidence, the finding of the Industrial Accident Board at second hearing that the employee's hand had not been rendered permanently incapable of use is conclusive, and warrants a ruling that compensation for total incapacity should cease as of the date of the second hearing.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — MINOR EMPLOYEE RECEIVING INJURY TO HAND HELD PROPERLY AWARDED COMPENSATION FOR PARTIAL DISABILITY.

Where the earning capacity of the injured employee, a boy of 15, though partially impaired by an injury to his hand, did not amount to a total loss of wage earning power, he was properly awarded compensation, under St. 1911, c. 751, as amended by St. 1914, c. 708, § 5, at two-thirds of the difference between his former weekly wages of $7 and the $3 he was able to earn at the date of second hearing. when it was determined that his total incapacity had ceased, and the previous order of the board as to compensation was modified.

(For other cases, see Master and Servant, Dec. Dig. § 385[10].)

Appeal from Superior Court, Essex County.

Proceedings under the Workmen's Compensation Act by John E. Barry, the employee, by his father, Michael J. Barry, as next friend, opposed by the Cape Ann Granite Corporation, the employer, and the United States Fidelity & Guaranty Company, the insurer. Compensation was awarded to a lesser extent and for a lesser amount than claimed, the award affirmed by the superior court, and from its decree, the employee appeals. Decree affirmed.

Wm. J. Hatch, of Gloucester, for appellant.
Carpenter & Wentworth, of Boston, for appellee

BRALEY, J. [1] The question for decision is whether the findings and rulings of the board member, which were adopted and affirmed by the Industrial Accident Board on review, should be reversed. It is contended by the employe that under St. 1911, c. 751, as amended by St. 1914, c. 708, § 5, the board erred in deciding that he was not totally incapacitated for work, and that compensation for total incapacity should cease April 18, 1919, and that the evidence is insufficient to support the finding of the board member or of the full board that he was not totally incapacitated April 18, 1919. It is undisputed by the insurer that the

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employe, a boy fourteen years of age, received an injury to his left hand in the course of, and arising out of his employment. The extent and nature of the injury is fully described in the record, and compensation was properly awarded from September 10, 1917, the eleventh day after the injury, to the date of the first hearing, April 23, 1918, to continue during the period of total incapacity. Gagnon Case, 228 Mass. 334, 117 N. E. 321; Septimo's Case, 219 Mass. 430, 107 N. E. 63. But the evidence at the second hearing held April 18, 1919, plainly warranted a finding that the hand had not been rendered permanently incapable of use. It still was a hand the use of which had not been entirely lost.

[2] The extent and permanency of the employe's disability was a question of fact, and the finding being conclusive the ruling that compensation for total incapacity should cease as of the date of the second hearing was correct. Amodio's Case, 233 Mass. 104, 123 N. E. 335; Pass' Case, 232 Mass. 515, 122 N. E. 642.

[3] It further appears, and the evidence supports the conclusion of the board member, that the employe notwithstanding the injury had an earning capacity in the labor market of a weekly wage of $3, if "he did not have the laudable desire of continuing at school." It follows that his earning capacity although partially impaired did not amount to a total loss of wage earning power, and he was properly awarded compensation at the rate of $2.67 a week, being two-thirds of the difference between his former weekly wages of $7 and $3, the amount he was able to earn at the date of the second hearing. Sullivan's Case, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378; Duprey's Case, 219 Mass. 189, 106 N. E. 686; Lacione's Case, 227, Mass. 269, 116 N. E. 485. The board reserved the right under St. 1911, c. 751, pt. 2, § 22, of awarding a lump sum after further consideration, but this reservation forms no part of the decree under which the case is before us. We find no error of law in the record and the decree must be affirmed.

Ordered accordingly.

GOLDEN & BOTER TRANSFER CO. v. BROWN & SEHLER CO. ET AL. (No. 10.)

(Supreme Court of Michigan. April 10, 1920.)

177 Northwestern Reporter, 202.

1. MASTER AND SERVANT—EMPLOYER PAYING COMPENSATION FOR SERVANT'S DEATH ENTITLED TO RECOVER FROM PERSON CAUSING INJURY.

Under Workmen's Compensation Law, pt. 3, § 15, an employer on payment of compensation awarded to the widow of a deceased servant is entitled to recover over against the third person negligently causing servant's death.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

2. MASTER AND SERVANT — TRANSFER COMPANY'S TEAMSTER SENT TO WORK FOR WRECKING CONTRACTOR HELD TO BE COMPANY'S SERVANT WITHIN COMPENSATION ACT.

Where a transfer company hired and paid a servant and put him in charge of one of its teams and sent him to do work for owners of a burned building through an arrangement with their contractors to work

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by the day, he was the servant of the transfer company, so as to render it liable under the Workmen's Compensation Act for his death.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

3. MASTER AND SERVANT — ASSUMPTION OF RISK NOT AVAILABLE TO THIRD PERSON SUED BY EMPLOYER UNDER COMPENSATION ACT.

Where a servant of a transfer company was sent with its team and wagon to do work for others upon another's premises, and was there killed by a falling wall, he was the servant of the company, and the doctrine of assumed risk could not be invoked to defeat the company's recovery under the Workmen's Compensation Act against the owner of premises.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

Error to Circuit Court, Kent County; John S. McDonald, Judge.

Action by the Golden & Boter Transfer Company against the Brown & Sehler Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Roland J. Cleland and Earl F. Phelps, both of Grand Rapids, for appellant Brown & Sehler Co.

Lombard & Hext, of Grand Rapids, for appellant Chas. Hoertz & Son.

Kerr & Lacey, of Detroit, and M. Thomas Ward, of Grand Rapids, for appellee.

MOORE, C. J. The trial judge stated the issues involved in this litigation in his charge to the jury as follows:

"This is an action by Golden & Boter, the plaintiffs, for the use and benefit of the Zurich General Accident & Liability Insurance Company, against Brown & Sehler Company and Hoertz & Son, to recover the amount of compensation which the plaintiff was compelled to pay to the widow of John Mellema, whose death was caused, as the plaintiff claims, by reason of the negligence of the defendants.

"The plaintiffs, Golden & Boter, are engaged in the business of general teaming, and as a part of such business furnish teams and teamsters to the contractors and others. Hoertz & Son are general contractors in this city, and at the time of the accident were engaged in razing and tearing away the debris accumulated by reason of a fire in the Brown & Sehler building located at the corner of Front street and Bridge street in this city. The Brown & Sehler Company owned the building which was destroyed by fire the 15th day of January, 1915, and had at the time in question employed Hoertz & Son to do the work in which they were engaged when this accident took place.

"On the 1st day of February, 1915, at the request of Hoertz & Son, Golden & Boter sent teams and teamsters to assist in the work of carrying away the debris. One of these teamsters was John Mellema. While so engaged, Mellema was killed, was instantly killed by the falling of a wall. His widow presented a claim for compensation from Golden & Boter under the Workmen's Compensation Act of Michigan. The Industrial Accident Board awarded her $6.05 per week for the period of 300 weeks from the 1st of February, 1915, the time of the accident. Under this award, Golden & Boter, by the Zurich General Accident & Liability Insurance Company, paid the sum of a thousand dollars, and to recover this amount so paid, the plaintiffs have brought this suit. They claim that

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the accident was caused by the negligence of the defendants in failing to provide a reasonably safe place in which Mr. Mellema could do his work; that the walls were dangerous and should have been razed or braced before the men were allowed to work near them.

"The defendants deny that they, or either of them, were negligent, as the plaintiff claims. They deny that the wall which fell was dangerous or defective in any manner. They say that they examined it and found no defects; that after the fire the premises had been examined by the fire department and by Mr. Davidson, the building inspector of Grand Rapids, and that a part of the wall in question had been taken down by the firemen under Mr. Davidson's direction, and that the defendants had no reason to believe that the portion that was left was in any way defective or unsafe. Defendants say that they used their best judgment in an effort to determine the safety of the wall, and that, so far as a careful inspection of the wall would show, it appeared to be reasonably safe; that they used every reasonable means to make a place where the workmen were employed reasonably safe; and that the wall did not fall because it was defective or weak or unsafe, but because of an unusual and violent windstorm. Defendants therefore say that they were not guilty of the negligence as claimed by the plaintiff."

The trial judge then gave the jury an elaborate charge as to the law he deemed applicable to the various phases of the case, which charge takes up 12 pages of the printed record and includes 8 carefully prepared written requests to charge, offered on the part of the defendants.

The jury returned a verdict in favor of the plaintiff in the sum of $1,046.65. The case is brought here by writ of error.

[1] Counsel say the court erred in not directing a verdict for the defendants and in not granting defendants' motion for a new trial and motion for judgment in their favor, claiming there had been an election of remedies. We quote from the brief:

"We are not unmindful of the fact that this court has considered section 15, pt. 3, of the Workmen's Compensation Law, so called, in the case of Grand Rapids Lumber Co. v. Blair, 190 Mich. 518, 157 N. W. 29. In that case, however, the employe was injured but not killed, and he elected to proceed under the Workmen's Compensation Law against his employer, and recovery was had against the employer as authorized by the act. This court also had this section before it in Albrecht Co. v. Iron Works, 200 Mich. 109, 166 N. W. 855. This also was a case where the employe was injured and received compensation from his employer. In neither case was there any question as to who was the employer.

"In this case Mellema, the employe, was not alive to make his election. The widow, a dependent mentioned under section 6 of the act, recovered as a dependent. Entirely independent of the question of the constitutionality of section 15 of the act, which will be later considered in this brief, the defendants contend that section 15 gives no authority to maintain this action. If Mellema had been injured only, instead of death resulting from the accident, he would have the right of electing to proceed against any person or corporation liable, and, had he done so, he would have waived his right to compensation. Nothing appears in this act that authorizes his personal representatives or any other person or persons to make such an election for him. The law makes no provision and provides no method of procedure for recovery, and it is quite probable that the Legislature foresaw the difficulties that might arise in cases similar to the case at bar, and for that reason intentionally omitted attempting to outline any such procedure."

Mrs. Mellema is not interested in the present litigation. It is authorized in express terms by section 15, pt. 3, of Act No. 10 of the Public Acts of 1912, as construed in Albrecht v. Iron Works, 200 Mich. 109, 166 N. W. 855; Vereeke v. City of Grand Rapids, 203 Mich. 85,

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168 N. W. 1019; Naert v. Western Union Telegraph Co., 206 Mich. 68, 172 N. W. 606.

[2] Counsel also claim the court erred in not granting defendant's motion for a directed verdict and in not granting defendant's motion for a new trial on the theory that Mr. Mellema was not an employe of Golden & Boter. We think this contention is disposed of by the undisputed testimony that Golden & Boter hired him and paid him and put him in charge of one of their teams, harness, and wagon, and while they in turn sent him and his outfit to do the work for Brown & Sehler, through an arrangement with Hoertz & Son to work by the day, he was all the while in the employ of Golden & Boter. See Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; Janik v. Ford, 180 Mich. 563, 147 N. W. 510, 52 L. R. A. (N. S.) 294, Ann. Cas. 1916A, 669.

[3] It is urged that Mr. Mellema assumed the risk. If he was in the employ of Golden & Boter, as we have just found, the doctrine of assumed risk would not apply.

[4] Counsel say a verdict should have been directed in favor of the defendants because the evidence in the case fails to establish any negligence on their part, and great stress is laid by counsel upon the claim that they did not know that the firemen had rocked the wall when they pushed some of them over. There had been a very disastrous fire. Some of the walls had fallen making a removal of the debris necessary. There would have been no difficulty if the inquiry had been made in learning just what tests had been made by the building inspector and the police department to determine the safety of the walls. It is a pertinent inquiry as to whether a man of ordinary prudence would not have made inquiries of the building inspector and the fire marshal as to what tests had been made. There is testimony to the effect that the building inspector told one of the defendants that part of the wall which fell should come down.

Some of the testimony of John Sehler is illuminating. We quote:

"After the fire, I had charge of looking after the insurance and letting contracts for clearing the debris and saving salvage in behalf of Brown & Sehler. The buildings were insured. Mr. William Hoertz represented us in figuring the loss on the building. The loss was adjusted on Wednesday of the last week of January. We then took steps to clear up the site and get out the salvage. I let the contract with Hoertz & Son on Saturday. I commenced considering that matter the next day after the insurance was adjusted. I telephoned Mr. Hoertz Friday evening after adjusting the insurance on Wednesday; they began work Monday morning. * * *

"Recross-examination: From January 15th, the date of the fire, to January 26th, when the insurance was adjusted, I didn't do anything with reference to protecting the walls, except to call Mr. Davidson to come over and talk about the building. I did not call any one else in consultation during that time except Mr. Hoertz with reference to the insurance. I talked with him about the walls, but not as to what should be done to make them safe.

"Q. Did he tell you that some of those walls must come down? A. Saying in regard to the new building, yes.

"Q. And you received insurance for the walls that must come down, did you not? A. I expect so.

"Q. And in that insurance that you received was there something for this north wall? A. How is that? Along with the rest, sure.

"Q. Along with the rest (showing picture). Do you know whether in the insurance that you received that this wall was included, this part that is still standing? A. I couldn't separate it.

"Q. You don't know, but you do know that there was taken into consideration the fact that those walls could not be used again and you

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received insurance upon them? A. We had a certain amount of insurance, and we received that, and that was on the whole building.

"Q. And the walls were taken into consideration, were they not? A. Yes."

When it is stated that the witness was a member of the firm of Brown & Sehler, and that William Hoertz was a member of the firm of Hoertz & Son, we think it cannot be said there was no proof of negligence.

[5] The defendants contend that, aside from all other elements of this case, the court should have directed a verdict on the ground that the accident was the result of unforeseen conditions and comes within the rule as an act of God, because of the unusually high wind, citing authorities.

The court charged the jury:

"Now, if you find that the sole cause of the falling of the wall was an extraordinary windstorm, such a windstorm as our experience in this locality would not lead us to anticipate, your verdict should be for the defendants, a verdict of no cause of action, for the falling of the wall from such a cause would be what is termed an act of God. I am going to repeat that to you again so that we will make no mistake about your getting it. If you find that the sole cause of the falling of the wall was an extraordinary windstorm, such a windstorm as our experience in this locality would not lead us to anticipate, your verdict should be for the defendants, a verdict of no cause of action, because the defendants would not be required by the law to guard against such an extraordinary storm as I have just been speaking of, for the falling of the wall from such a cause would be what is termed the act of God. By the term 'act of God' is meant those events and accidents which proceed from natural causes and cannot be anticipated and provided against, such as unprecedented storms, or freshets, lightning, earthquakes, etc. For a loss occasioned by the act of God, as I have defined it, the defendants would not be responsible. If the sole cause of the falling of the wall was an act of God, I said the plaintiff cannot recover."

The jury was charged in great detail upon this subject.

[6] Counsel query: Was that part of section 15 of part 3 of Act No. 10 of the Public Acts of 1912 (Special Session) relied upon by the plaintiff in this case, unconstitutional because of not being within the scope of the title of said act? The title of the act is quoted, and counsel say:

"A careful examination of the title to the act in question shows no reference in any way to a third person. The act is clearly and distinctly, so far as its title is concerned, one pertaining to the relationship of master and servant. It will be observed that, leaving out section 15 of part 3, third persons are in no sense and in no way made parties to the act, and none of the obligations, rights, or remedies that it imposes apply in any way to third persons. It will be further observed that section 15 creates a new obligation on the part of third persons. It creates a new basis or an entirely different basis as a measure of damage for which the third party is required to respond, and the fact that in most instances it might be more favorable than in an action at law, for negligence cannot operate to validate the law."

In Mackin v. Detroit Timkin Axle Co., 187 Mich. 8, 153 N. W. 49, Justice Steere had under consideration this very subject. We quote from his opinion:

"The particulars pointed out in which it is claimed the act contains provisions not referred to or comprehended in the title are that it repeals an existing statute relative to contracts with attorneys for services, creates a right of action against a third party by the employer of the injured, subrogating the employer to the rights of the employe, and requires the injured employe to seek compensation from an insurance company, instead of his employer. The last objection, we think, is dis-

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posed of in Barnard v. McLeod, 114 Mich. 73 (72 N. W. 24), where section 16 of the mechanics' lien law (Pub. Acts 1891, p. 230), providing for subrogation under certain circumstances, was sustained, although the title of the act did not in terms give notice of such a provision, and the constitutionality of the act was assailed on the ground of defective title, and the court said:

"'We think there is no merit in the constitutional question raised.'

"If there be any repeal of the statute with reference to attorney's contracts, it is by implication only. The portion of the act questioned provides:

"'The fees and the payment thereof of all attorneys and physicians for services under this act shall be subject to the approval of the Industrial Accident Board.'

"This is but a detail of method for ascertaining and insuring in the first instance full payment to the injured, is germane to the act, and its repealing effect by implication is a matter of construction. An examination of sections 6 and 14, pt. 3, of the act, clearly indicates that the employe is not relegated to seek compensation for his injuries to an insurance company, but liability under the act is clearly upon the employer, and the provisions for insurance are in security and aid of payment by him.

"Details in many respects similar to these, and numerous others not specifically enumerated in the titles, are to be found in the Wisconsin, Massachusetts, Minnesota, Ohio, Illinois, New Jersey, California, and Montana Employers' Compensation Acts, the general constitutionality of which has been sustained; and, while it does not appear that these exact objections were raised and passed upon, those acts and the opinions sustaining them are significant and persuasive of the natural and necessary scope of this class of legislation in order to accomplish the object sought, as declared in a general title. We think the objections urged to the title of this act are not tenable under the decisions of this and other courts."

We have discussed the most important assignment of error. We have carefully considered the others, but cannot discuss them in detail without making this opinion unduly long.

We find no reversible error.

WEBSTER v. STEWART. (No. 77.)

(Supreme Court of Michigan. April 10, 1920.)

177 Northwestern Reporter, 230.

2. MASTER AND SERVANT—CORPORATE EMPLOYER'S VICE PRESIDENT INJURYING EMPLOYEE HELD A "PERSON OTHER THAN EMPLOYER" WITHIN COMPENSATION ACT.

A corporation's vice president causing injury to one of its employee's while they are engaged in its business is a "person other than employer" within Workmen's Compensation Law, pt. 3, § 15, authorizing employee injured by some person other than the employer to elect between compensation from employer or recovery of damages from that person.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

Error to Circuit Court, Calhoun County; Walter H. North, Judge.

Action by Charles T. Webster against Louis E. Stewart. Judgment for plaintiff, and defendant brings error. Affirmed.

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Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Cavanaugh & Burke, of Ann Arbor, and Joseph L. Hooper, of Battle Creek, for appellant.

Ira A. Beck, of Battle Creek, for appellee.

CLARK, J. Plaintiff, Webster, sued defendant, Stewart, claiming damages for personal injuries suffered by him while riding in an automobile driven by defendant. It is claimed that the injuries were due to the negligent and unlawful driving of the defendant. Plaintiff was an employe of the Union Steam Pump Company, a corporation of Battle Creek, and both were under the Workmen's Compensation Act (chapter 101, Comp. Laws 1915). Defendant was vice president and a director of the company. When plaintiff was injured both he and the defendant were engaged in the business of the company. They were going for the corporation from Battle Creek to Centerville to list from questionnaires the names of mechanics. Payments were later made to plaintiff by the Union Steam Pump Company, which it is claimed were made under the Compensation Act above mentioned, but there was no report or proceeding as to the accident before the Industrial Accident Board. After accepting four of these payments plaintiff refused to sign a compensation agreement under the act and commenced this suit. The court denied defendant's motion for a directed verdict. Plaintiff had verdict and judgment for $800. By assignments of error defendant presents three questions.

[1] 1. A juror or his voir dire said he owned an automobile, and was asked if he was a member of the Citizens' Mutual Automobile Insurance Company. Over defendant's objection answer was taken, and defendant says this was error. Plaintiff testified without objection that defendant told him that he need not worry about the damages; that the insurance on his car would cover all damages done by the car. On direct examination defendant denied making the statement, and his counsel went into the insurance matter at length. No complaint is made that any improper use was made of this testimony or that it was improper. There is nothing to indicate that the inquiry complained of was not made in good faith. The record does not disclose that defendant exercised any of his peremptory challenges, or preferred any request to charge upon the subject. The matter, even if meritorious, was waived. Link v. Fahey, 200 Mich. 308, 166 N. W. 884; Snyder v. Mathison, 196 Mich. 378, 163 N. W. 104; William R. Roach & Co. v. Blair, 190 Mich. 11, 155 N. W. 696.

[2] 2. Section 15, pt. 3, of said Compensation Act provides:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employe may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

Plaintiff did not proceed against his employer under the Compensation Act. Brabon v. Gladwin Light & Power Co., 201 Mich. 697, 167 N. W. 1024. Defendant claims that he was not "some person other than the employer" under the statute. This was urged as the ground for a direction of verdict. At the time plaintiff was injured he and defendant were servants of the company. Defendant was acting as a superior under whom plaintiff was working at the time. Defendant does not discuss common-law liability (26 Cyc. 1543, 2 L. R. A. [N. S] 379; Mechem on

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Agency [2d Ed.] vol. 1, §§ 1460-1478), but says that, if he is to be held liable here, the provisions of the Compensation Act above mentioned will be rendered nugatory as to corporations. Judge North, in disposing of this question, cited and relied on the case of Churchill v. Stephens, 91 N. J. Law, 195, 102 Atl. 657. The New Jersey Workmen's Compensation Act has a provision substantially like the one above quoted. In that case the plaintiff was employed in a shop of which the defendant was foreman or superintendent. Plaintiff in the employment was injured and claimed that such injury resulted from defendant's negligence. The court said:

"The suggestion that the Workmen's Compensation Act deprives the plaintiff of his right of action is unavailing in the face of the amendment of 1913 (P. L. 312), which enacts that the existence of a right of compensation from the employer under the statute shall not operate as a bar to the action of the employe. It is said that the defendant is not a 'third person' within the meaning of the act. We see no reason for attributing to the words 'third person' any other meaning than the usual one. It must mean, as indeed the subsequent language of the section makes perfectly plain, a person other than the employer or employe."

The words of our statute "some person other than the employer" should be given their plain and usual meaning. The corporation was the employer. As to the plaintiff, employe, the defendant was a person other than his employer.

[3] 3. Plaintiff's attorney in argument said:

"I would not go through what Mr. Webster did for several times $10,000."

Defendant says this was prejudicial error. Upon objection plaintiff's attorney said he desired to amend the statement and asked the court to charge the jury, and the court thereupon said:

"For the time being we will pass it by, saying to the jury that they must not be influenced in their determination by statements of counsel not justified by the evidence in the case, and it is not a question of what counsel would endure the suffering for or what any juryman would endure the suffering for, but it is a question for the jury to determine if it finds in favor of the plaintiff, and they should not be influenced by reason of any statement of counsel."

And in the general charge the court repeated substantially this instruction. The testimony of plaintiff and his witnesses indicated that plaintiff was somewhat seriously injured, that he had suffered considerable pain, and had expended about $300 for medical attendance. The amount of the verdict may be said to negative any inference of prejudice because of the statement of counsel, and the error was cured by the instructions of the court.

The judgment is affirmed.

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NESBITT v. TWIN CITY FORGE & FOUNDRY CO. (No. 21590,)

(Supreme Court of Minnesota. April 1, 1920.)

177 Northwestern Reporter, 131.

(Syllabus by the Court.)

1. MASTER AND SERVANT—GENERALLY INJURY WHILE GOING TO OR RETURNING FROM WORK DOES NOT ARISE OUT OF EMPLOYMENT WITHIN COMPENSATION ACT.

As a general rule an injury suffered by an employee in going to or returning from the employer's premises where the work of his employment is carried on does not arise out of his employment so as to entitle him to compensation under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

2. MASTER AND SERVANT — INJURY WHILE RIDING TO WORK IN EMPLOYER'S CONVEYANCE HELD NOT ONE "ARISING OUT OF AND IN COURSE EMPLOYMENT" WITHIN COMPENSATION ACT.

Construing subsection (i), § 8230, Gen. St. 1913, it is *held* that an accidental injury to a workman sustained while he was riding to his place of work in a conveyance furnished by his employer in compliance with one of the terms of the contract of employment and for the use of his employees, but in which the workman was not directed or required to ride, does not arise out of and in the course of the employment; it appearing that the injury was received before, and not during, the hours of the workman's service, when his employer had no control over him and before the beginning of the period covered by his wages.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from District Court, Ramsey County; H. R. Brill, Judge.

Action by Arthur C. Nesbitt against the Twin City Forge & Foundry Company. Verdict for plaintiff, and from an order denying its motion for judgment notwithstanding the verdict, defendant appeals. Order affirmed.

Geo. H. Sullivan, of Stillwater, and Ware & Melrin, of Minneapolis, for appellant.

Orr, Stark & Kidder, of St. Paul, for respondent.

LEES, C. This is an appeal from an order denying defendant's motion for judgment, notwithstanding the verdict, in an action for damages for personal injuries caused by defendant's negligence.

It is urged as the sole ground for reversal that plaintiff and defendant were both under the Workmen's Compensation Act of this state (Gen. St. 1913, c. 84a) when plaintiff was injured, and that he is entitled only to the compensation provided for by that act. Briefly stated, the facts are as follows:

Defendant was making shells for the United States government at Stillwater, in this state, carrying on its business in two separate buildings, respectively known as the "upper" and the "lower" plant. A large number of men were employed in each building. Plaintiff worked at the upper plant as a furnace feeder. He worked eight hours per day, was paid by the hour, and received pay from the time when he "punched

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in" on the time clock in the building where he worked. The upper plant was located a mile or more from the end of the nearest street car line. The men employed there objected to walking from the car line to the plant when they went to work. To satisfy them, defendant put in service two of its automobile freight trucks, running them from the upper plant to the car line to carry its employes to and from their work. It was part of his contract of employment that plaintiff, in common with other employes, should have the right to ride gratis on these trucks in going to and returning from his work. While thus riding on his way to his place of work, but before reaching it, and before the beginning of the period for which he received wages, he was injured as the result of the negligence of the driver of the truck, and brought this action to recover general damages.

At the close of plaintiff's case, defendant requested the court to dismiss the jury and proceed to dispose of the case under the Compensation Act, and at the close of all the evidence it moved for a directed verdict on the ground that plaintiff's only remedy was under the act. The court ruled against defendant in each instance, and plaintiff had a verdict for $2,500.

[1, 2] The decision of the case turns upon the construction of those portions of the Compensation Act which read as follows:

"If both employer and employe shall * * * become subject to part 2 of this act, compensation * * * shall be paid * * * in every case of personal injury * * * caused by accident, arising out of and in the course of employment." Section 8203, G. S. 1913.

"Without otherwise affecting either the meaning or interpretation of the abridged clause, 'personal injuries arising out of and in the course of employment,' it is hereby declared:

"Not to cover workmen except while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Subsection (i), § 8230, G. S. 1913.

The latter provision has been referred to or considered in the following cases: State v. District Court of St. Louis County, 129 Minn. 176, 151 N. W. 912; Otto v. Duluth Street Ry. Co., 138 Minn. 312, 164 N. W. 1020; State v. District Court of Itasca County, 140 Minn. 470, 168 N. W. 555; Erickson v. St. Paul City Ry Co., 141 Minn. 166, 169 N. W. 532; State v. District Court of Hennepin County, 175 N. W. 110; Podgorski v. Kerwin, 175 N. W. 694. In none of them did the facts present the precise question now before us. Defendant refers us to decisions of other courts that fairly sustain its contention that plaintiff's injuries were caused by accident arising out of and in the course of his employment.

Donovan's Case, 217 Mass. 76, 104 N. E. 431, Ann Cas. 1915C, 778, Littler v. George Fuller Co., 223 N. Y. 369, 119 N. E. 554, and Sala v. Am., etc., Tobacco Co., 93 Conn. 82, 105 Atl. 346, are the leading American cases and are directly in point. The weight to be given them is lessened by the fact that they were decided under statutes which do not contain the qualifying provision found in our statute and set out above.

This court has several times had before it cases involving the question of whether a person when injured was engaged in the discharge of the duties of his employment so as to subject his employer to liability. Rosenbaum v. St. Paul, etc., Ry. Co., 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653; McDonough v. Lampher, 55 Minn. 501, 57 N. W. 152, 43 Am. St. Rep. 541; Benson v. C., St. P., M. & O. Ry. Co., 78 Minn. 303, 80 N. W. 1050; Wallin v. Eastern Ry. Co., 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481; Thomas v. Wis. Central Ry. Co., 108 Minn. 485, 122 N. W. 456, 23 L. R. A. (N. S.) 954.

Whether a servant was acting in the course of or within the scope of his employment so as to subject the master to liability to a third

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person for the consequences of the servant's acts has also been very frequently considered by this court. From among such cases plaintiff has selected Morier v. St. P., M. & M. Ry. Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793 and Kuehmichel v. W. U. Teleg. Co., 125 Minn. 74, 145 N. W. 788, L. R. A. 1918D, 355, as demonstrating that he was not in the line of his employment when injured. All but the last of these cases arose prior to the enactment of the Compensation Law, and it was not involved in the Kuehmichel Case. It was involved in Podgorski v. Kerwin, supra, where the court said:

"It is a well-settled general rule that an injury suffered by an employe in going to or returning from the employer's premises where the work of his employment is carried on, except in special instances not here involved, does not arise out of his employment so as to entitle him to compensation."

Upon this general rule some courts have ingrafted the following exception:

"When an employe is injured while riding to his place of work in a conveyance provided by the employer, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employes, and is one which they are required or, as a matter of right, are permitted, to use by virtue of that contract, the injury may be held to have arisen out of and in the course of the employment so as to entitle the employe to compensation."

This statement of the exception is taken from Donovan's Case, supra. Cases in which it has been given or denied recognition are collected in 1 Honnold on Workmen's Comp. § 110; Bradbury's Workmen's Comp. § 480; L. R. A. 1916A, 61, 235; L. R. A. 1918F, p. 907. So far as we have discovered, the statutes in all of the cases where the exception has been recognized do not contain the qualifying clause which is in our statute.

Practically all compensation statutes make use of the words "in the course of the employment." It is generally stated that the phrase refers, among other things, to the period of employment. It has been an endless source of difficulty to determine when that period begins and ends. We think the Legislature undertook to set the question at rest by subsection (i), § 8230. Great Britain's Compensation Act contains part of the phraseology of this subsection. It provides that the act shall not apply where the accident occurred elsewhere than on, in, or about the premises on which the employer had undertaken to execute the work. The English cases construing this provision of the act are not in harmony. Some do and others do not recognize the above-stated exception to the general rule. See 25 Harv. Law Review, 405.

In the 1911 report to the Legislature of the Minnesota employes commission, subsection (i) appears in the identical form in which it is found in the statute. In an explanatory note appended to it the commission said that it was intended to put a few limitations upon the expression "personal injuries arising out of and in the course of employment," for fear that it might not receive the same interpretation that it was meant to have. In State v. District Court of St. Louis County, supra, this court also spoke of subsection (i) as being in the nature of a limitation of the general clause "arising out of and in the course of employment." We are now called upon to decide whether the general rule stated in Podgowski v. Kerwin, supra, should be made subject to the exception heretofore mentioned in view of the limitations expressed in subsection (i).

When plaintiff was injured, he was not in, on, or about the premises where his services were performed, unless it may be said that the truck on which he was riding was for the time being part of such premises. A situation might arise which would require such a holding. It is not present here, for, when plaintiff was injured, he was not at a place

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where he was performing or might perform any service for defendant, nor at a place where his presence was required, as he had not been directed to ride on the truck but was doing so for his own convenience. The injuries were suffered before and not during his hours of service, at a time when defendant had no control over him, and before the period covered by his wages had begun. The facts here presented are less favorable to the contention that plaintiff is within the act than they were in Otto v. Duluth Street Ry. Co., supra, or in Erickson v. St. Paul City Ry. Co., supra, where a similar contention was not sustained. What was said in the opinions in those cases points to the conclusion we reach in this case.

We hold that the express terms of subsection (i), § 8230, G. S. 1913, exclude plaintiff from the operation of the Compensation Act, and that he was properly permitted to recover in this action.

It may be that cases will arise where it will be a hardship to an employe to deny him compensation for an injury received while on his way to his place of work. It may be desirable to extend the act so that it will apply to cases of that sort. That, however, is a matter for the consideration of the Legislature, and will doubtless receive at its hands the attention it merits.

Order affirmed.

ROONEY v. CITY OF OMAHA. (No. 21352.)

(Supreme Court of Nebraska. March 13, 1920.)

177 Northwestern Reporter, 166.

(Syllabus by the Court.)

1. MASTER AND SERVANT—POLICEMAN HELD NOT AN "EMPLOYEE" PROTECTED BY COMPENSATION ACT; "WORKMAN"; "OFFICER APPOINTED FOR REGULAR TERM."

A qualified and acting policeman of the city of Omaha is an "officer appointed for the regular term" of good behavior, unless the office itself is abolished, and is not included in the class of "workmen" and "employees" entitled to compensation from the city under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other defintions, see Words and Phrases, First and Second Series, Employee; Workman.)

(Additional Syllabus by Editorial Staff.)

2. MASTER AND SERVANT—"REGULAR" TERM MEANS TERM CONFORMABLE TO LAW.

The word "regular," as used in Workmen's Compensation Act, § 4, declaring that employees and workmen shall include persons in the service of the state or governmental agencies under appointment or contract, but excepting officials who have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term, means conformable to law.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Regular.)

Appeal from District Court, Douglas County; Troup, Judge.

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Claim by May Rooney, widow, against the City of Omaha for compensation under the Workmen's Compensation Act for the death of Frank Rooney, a city policeman. Judgment for claimant, and the City of Omaha appeals. Reversed, and claimant's proceeding dismissed.

Frank L. Weaver, W. C. Lambert, and H. L. Mossman, all of Omaha, for appellant.

Geo. H. Merten, of Omaha, for appellee.

ROSE, J. This is a claim under the Workmen's Compensation Act. Frank Rooney, while performing the duties of a policeman in the city of Omaha, was feloniously shot January 30, 1918, and as a result died the next day. The claimant for compensation is his widow. The district court allowed her $1,140, and in addition $12 a week for 350 weeks and $200 for the expenses of his last illness and funeral. From a judgment in her favor for these items, the city of Omaha has appealed.

It is contended on behalf of the city of Omaha that it is not liable to claimant under the Workmen's Compensation Act. A class of employes and workmen protected by the statute is described as follows:

"Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written, but shall not include any official of the state, or any governmental agency created by it, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term." Rev. St. 1913, § 3656 (Laws 1917, c. 85, § 4).

The city of Omaha in its control over the police department is a governmental agency of the state. Frank Rooney, when assaulted, was in the service of the city as a policeman at a salary of $125 a month. He was at the time attempting to uphold the law. He had been required to take an oath of office and to give an official bond. Rev. St. 1913, §§ 4171, 4208. Statutes and judicial opinions refer to policemen as officers. Rev. St. 1913, §§ 4171, 4208, 5300; State v. City of Lincoln, 101 Neb. 57, 162 N. W. 138. By appointment or election Rooney was a public officer. Rev. St. 1913, § 5300; Blynn v. City of Pontiac, 185 Mich. 35, 151 N. W. 681; Schmitt v. Dooling, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881 and note, Ann. Cas 1913B, 1078. The duties of a municipal police officer in enforcing the laws are governmental in character. Gillespie v. City of Lincoln, 35 Neb. 34, 52 N. W. 811, 16 L. R. A. 349. In Adams v. City of Omaha, 101 Neb. 690, 164 N. W. 714, it was said:

"There can be no doubt that the state, because of the interest that the state at large has in enforcing the laws and in protecting property from fire, has jurisdiction over the police and the fire department."

[1, 2] Claimant insists, however, that her husband was not an official, appointed "for a regular term of office," within the meaning of the exception to the statutory provision declaring that employes and workmen shall include "every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written." This point presents the controlling question raised by the appeal. Under the charter of the city of Omaha a policeman can only be removed for cause after notice and a hearing. Rev. St. 1913, § 5300; State v. City of Lincoln, 101 Neb. 57, 162 N. W. 138. It follows that a police officer of the city of Omaha is appointed for the term of good behavior, unless the office itself is abolished by law. This term of office seems to be a "regular term" within the meaning of the Workmen's Compensation Act. The word

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"regular," describing the "term," appears to have been used by the Legislature in the popular sense of "conformable to law" to distinguish officers included in the exceptions from the workmen and employes in the general class. In this sense the compensation allowed by the district court is not authorized by the Workmen's Compensation Act. The judgment below is therefore reversed, and the claimant's proceeding dismissed.

Reversed and dismissed.

Letton and Day, JJ., not sitting.

WATTS v. DERRY SHOE CO., INC.

(Supreme Court of New Hampshire. Rockingham. Dec. 2, 1919.)

109 Atlantic Reporter, 837.

MASTER AND SERVANT—DECLARATION FOR NEGLIGENCE CAN BE AMENDED TO ALLEGE NONACCEPTANCE OF COMPENSATION ACT.

Under Pub. St. 1901, c. 222, § 8, allowing amendments in matters of substance at any stage to prevent injustice, a declaration, in case for negligence to recover for injuries received while in defendant's employ may be amended so as to allege that defendant was within the terms of Workman's Compensation Act, and had not accepted the provisions thereof, which merely gives notice that plaintiff claims the benefits of section 4 of that act, modifying common-law rules of liability in her favor."

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Transferred from Superior Court, Rockingham County; Sawyer, Judge.

Action by Martha E. Watts against the Derry Shoe Company, incorporated. Question of power to grant leave to amend the declaration to allege nonacceptance of Workman's Compensation Act by defendants was transferred from superior court. Case discharged.

The declaration alleged the unsafe condition of the floor of the room in which the plaintiff worked as the negligence causing her injury.

Subsequently she asked leave to amend her declaration by adding a count in which she alleged her employment by the defendants at work in a factory in connection with machinery operated by steam or other mechanical power, wherein more than five persons were engaged in manual and mechanical labor and that the defendants had not accepted the provisions of Laws 1911, c. 163.

Norman F. Watts, of Derry, and Scammon & Gardner, of Exeter, for plaintiff.

Hughes & Doe, of Dover, for defendants.

PER CURIAM. Amendments in matters of substance may be allowed by the court in any stage of the proceedings when necessary to prevent injustice. P. S. c. 222, § 8.

Under chapter 163, Laws 1911, a servant of an employer who has accepted the provisions of the act in case of injury may bring an action against his employer to recover for such injury upon the ground that it was caused by his employer's negligence, or he may seek the compensa-

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tion provided by the act into which the question of negligence does not enter. After election of either remedy the alternative remedy is not open to him. Id. § 4. When, as alleged in this case, the employer has not accepted the provisions of the chapter, the injured employe has no election. His only remedy is an action of case for negligence.

By the statute, in certain cases common-law rules of liability are materially modified in favor of the plaintiff against an employer who has not accepted the act. The only object of referring to the statute in the declaration is to give notice of a claim that the case is within these provisions of the statute. The statute regulates the rights of the parties, and must be applied whenever called to the attention of the court, unless upon some ground the plaintiff has estopped himself from claiming its benefits. The proposed amendment gives the defendants seasonable notice, and no ground appears upon which the court can refuse to allow it, or after the notice given by the offer of the amendment deprive the plaintiff of the benefit of the statute. Section 4, c. 163, Laws 1911, has no application.

Case discharged.

WOODRUFF v. R. H. HOWES CONST. CO. ET AL.

(Court of Appeals of New York. March 19, 1920.)

127 Northeastern Reporter, 270.

2. MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW INJURY WAS CAUSED BY "ACCIDENT" UNDER COMPENSATION LAW.

In a proceeding under the Workmen's Compensation Law by a carpenter who bruised the palm of his hand in pressing a screwdriver, the bruise resulting in a felon, the injury cannot be deemed caused by an "accident," an accidental event taking place without foresight or expectation or proceeding from an unknown cause.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

(For other definitions, see Words and Phrases, First and Second Series, Accident.)

3. MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW THAT A FELON RESULTED FROM USING SCREWDRIVER.

In a proceeding under the Workmen's Compensation Law by a carpenter who suffered a frog felon in his hand, evidence insufficient to show that the felon resulted from pressing on screwdriver with the palm of his hand.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Emerson H. Woodruff, employee, against the R. H. Howes Construction Company, employer, and the Travelers' Insurance Company, insurance carrier. From an order of the Appellate Term (189 App. Div. 395, 178 N. Y. Supp. 418), affirming an award of the Industrial Commission, the employer and insurance carrier appeal. Reversed, and claim remitted to commission.

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Amos H. Stephens, of New York City (E. C. Sherwood, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

ELKUS, J. Claimant was a carpenter, employed by R. H. Howes Construction Company, and engaged in the erection of buildings. The compensation commission found that on December 23, 1918, while Woodruff was engaged in his employment, in using "a screwdriver he bruised the palm of the right hand, which developed into a frog felon, and as the result of which he was disabled."

[1] The affirmance of this finding of fact was by a divided court, and we are therefore at liberty to examine the facts to ascertain if there is any evidence in its support.

[2, 3] The affidavit of the claimant, verified January 21, 1919, avers that on December 21, 1918, he felt a pain between the first and second fingers in the palm of the right hand, which feeling was very much as though there was a splinter there, but that he did not run any splinter in the palm of his hand, and that the pain increased.

Upon the hearing before the commission, he testified that he did not know definitely just what caused the pain or injury, but he believed it was caused by the constant use of a screwdriver, "as is first stated," evidently referring to the statement in his affidavit referred to; that the pain was several days coming on; that at no time did he get a splinter in his hand or any particle of grit or anything that was ground in his hand from the screwdriver, but he thought it was just from its continual use; that it bruised the flesh; that at times he fastened a pin in the jamb, and then would set his screwdriver there and hit it with his hand; that his hand felt tender at the time, but that he had never had anything like this.

This testimony was insufficient to show that the injury was caused by accident. An accidental event takes place without one's foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of the known cause, and therefore not expected. Paul v. Travelers' Insurance Co., 112 N. Y. 472, 20 N. E. 347, 3. L. R. A. 443, 8 Am. St. Rep. 758; 14 R. C. L. § 418, p. 1238.

It is quite clear that the evidence to which reference has been made was insufficient to establish the conclusion of fact found by the Industrial Commission—that the frog felon resulted from the use of the screwdriver, which bruised the palm of the right hand. Matter of Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735; Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540.

Under the evidence produced, we do not believe that the commission was justified in making the conclusion of fact which it did. Matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254.

The order of the Appellate Division and the determination of the Industrial Commission should be reversed, and the claim remitted to the commission for rehearing, with costs to abide the event.

Hiscock, C. J., and Collin, Hogan, Pound, McLaughlin and Andrews, JJ., concur.

Order reversed, etc.

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FARRINGTON v. UNITED STATES RAILROAD ADMINISTRATION ET AL.

(Court of Appeals of New York. March 9, 1920.)

127 Northeastern Reporter, 272.

MASTER AND SERVANT — ACCIDENT HELD NOT TO HAVE OCCURRED IN "COURSE OF EMPLOYMENT" BY RAILROAD COMPANY.

Where a laborer employed by another to unload a car was called by a station agent, not authorized to employ him, to assist him to close the door of a box car near by, just as the laborer was about to leave for home, and was injured in so doing, the accident did not occur in the "course of employment" by the railroad company so as to render it liable under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding for Compensation under the Workmen's Compensation Law by Mary L. Farrington, widow, on behalf of John Farrington, deceased, against the United States Railroad Administration, Walker D. Hines, Director General of Railroads, and the Long Island Railroad. An award by the State Industrial Commission in favor of claimant was affirmed on appeal (190 App. Div. 920, 179 N. Y. Supp. 920), and defendants appeal. Award and order affirming the same reversed.

Appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 3, 1920, affirming an award of the State Industrial Commission made under the Workmen's Compensation Law (Consol. Laws, c. 67). Two laborers, of whom claimant's decedent was one, were engaged in unloading screenings for their employer from a car standing on the tracks of the Long Island Railroad. They finished their work and boarded a motortruck of their employer to return to their homes. The station agent of the Long Island Railroad, together with a helper, was then making an effort to close one of the doors of a box car standing near by. The agent called out to the men on the truck, "Come on, fellows, give me a hand to close this door." Both men went over to help move the door, which in closing caught the hand of Farrington and clipped off the end of his finger, with the result infection set in and he subsequently died of the disease of tetanus.

Joseph F. Keany, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

PER CURIAM. Award and order reversed, with costs against the Industrial Commission, upon the opinion of H. T. Kellogg, J., below.

Hiscock, C. J., and Collin, Hogan, Pound, McLaughlin, Andrews, and Elkus, JJ., concur.

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IN RE HESS.

STATE INDUSTRIAL COMMISSION v. DOWNER STEEL CO. ET AL.

(Supreme Court of New York. Appellate Division, Third Department. May 5, 1920.)

181 New York Supplement, 674.

1. MASTER AND SERVANT—DEPENDENCY UNDER COMPENSATION LAW DETERMINED AS OF TIME OF ACCIDENT.

Under Workmen's Compensation Law, § 10, dependency shall be determined as of time of accident.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT — AWARD TO DEPENDENTS OF MORE THAN DECEDENT'S CONTRIBUTIONS AUTHORIZED.

Under Workmen's Compensation Law, § 16, subd. 4, award in favor of dependent mother, brothers, and sisters of deceased servant, aggregating more per month than was contributed by deceased to dependents, *held* authorized.

(For other cases, see Master and Servant, Dec. Dig. § 386[1].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by Florence M. Hess for compensation for death of her son, Martin G. Hess, the employee, opposed by the Downer Steel Company, the employer, and the Zurich Accident & Liability Insurance Company, Limited, the insurance carrier. Compensation was awarded by the Industrial Commission, and the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Philip J. O'Brien, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

Bernard L. Shientag, of New York City, for State Industrial Commission.

KILEY, J. On the 6th day of November, 1918, at 10 a. m. of that day, Martin G. Hess received injuries from which he died within a short time. At the time he was working for the Downer Steel Company, Incorporated, at their plant, located at North Tonawanda, N. Y. This corporation manufactured steel products; the decedent had worked for it 1½ years, was about 20 years of age, and unmarried. His occupation was such as comes under the definition of hazardous in the Workmen's Compensation Law (Consol. Laws, c. 67). Jacob Hess, the father of Martin, died August 2, 1918. The claimants are mother and brothers and sisters of the deceased. At the time, and for some years previous, the family, except Martin, had lived on a cheap, hilly farm over the line in the state of Pennsylvania. The evidence abundantly sustains the contention of the claimants that Martin contributed to their support, and that they were dependent upon him at the time of the accident. The State Industrial Commission so found, and awarded to the mother, Florence M. Hess, $5.77 weekly, and to Harry C., John L., Wallace,

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Florence, Grace, and Daisy, dependent brothers and sisters, each $1.60 1/3 weekly—a total of $15.30. The average weekly wage of Martin was $24.98.

[1, 2] Appellants contend that, because this amounts to more than the sum contributed to these dependents by the son (he contributed $35 to $40 a month), the award ought not be affirmed. Under section 10 of the Workmen's Compensation Law, dependency shall be determined as of the time of the accident. Birmingham v. Westinghouse Electric Mfg. Co., 180 App. Div. 48, 167 N. Y. Supp. 520. The commission has so found and the finding is sustained by the evidence Section 16, subd. 4, also provides for this form of the award and for the amounts awarded. Walz. v. Holbrook, Cabot & Rollins Corp., 170 App. Div. 6, 155 N. Y. Supp. 703. The record on appeal in Chabot v. Terry Bros. Co., 184 App. Div. 917, 170 N. Y. Supp. 1072, shows that the amount contributed before the accident and death was $750 a week, and the award was $9.61 a week.

The award should be affirmed. All concur.

BAKER v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of New York, Appellate Division, Second Department. April 9, 1920.)

181 New York Supplement, 675.

1. COMMERCE—LIABILITY FOR DEATH OF LINEMAN ON INSTRUMENTALITY OF "INTERSTATE COMMERCE" DEPENDS ON FEDERAL LAW.

An employee, working as a lineman on an interstate railroad's anchor bridge, which spans its main line, was employed on an instrumentally of interstate commerce, and the railroad's liability for his death depends on federal law, so that employee's contributory negligence does not bar recovery.

(For other cases, see Commerce, Dec. Dig. § 27[8].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

Appeal from Trial Term, Westchester County.

Action by Mary E. Baker, as administratrix of the estate of John J. Baker, deceased, against the New York, New Haven & Hartford Railroad Company. Judgment for defendant on directed verdict, plaintiff's motion for new trial denied, and plaintiff appeals. Reversed, and new trial granted.

Argued before Jenks, P. J., and Putnam, Blackmar, Kelly, and Jaycox, JJ.

William Adams Robinson, of Brooklyn, for appellant.
Charles M. Sheafe, Jr., of New York City, for respondent.

PER CURIAM. [1] As decedent's work as lineman on defendant's anchor bridge, which spans its main line, was on an instrumentality of interstate commerce, defendant's liability, if any, must be sought under the federal law. New York Central R. R. Co. v. Winfield, 244 U. S.

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147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R A. 1918C, 439, Ann. Cas. 1917D, 1139. The question is whether the evidence sustains a finding that defendant was negligent; for, in case the defendant was negligent, the decedent's contributory negligence does not bar the action, but affects the measure of damages only.

The decedent was killed by a feed wire, charged with a deadly current of electricity, coming in contact with the bridge of his nose, as conceded on the trial by defendant's counsel. Pursuant to the needs of his employment, he was on a bridge which sustained the trolley wires, and the wire that caused his death was a feed wire carrying to the trolley wires the current which supplied the power to move the trains. Another feed wire beneath the top bridge was screened, but the wire from which the decedent received the charge was unprotected, and so located that one standing on the bridge might, through momentary inattention, stumbling, or even carelessness, come in contact with it, and such contact meant death.

[2, 3] The defendant owed to its employes the duty to use due care to safeguard them and to furnish them a reasonably safe place to work. The duty was owing to the decedent when he went upon the bridge in due course of his work. It cannot be said as matter of law that the duty was discharged. This presents a question of fact for the jury. The federal law does not prescribe the manner in which the duty shall be performed, whether by screening the wire, or by so locating it that employes in the performance of their duty will not come into contact with it. The evidence did not show that screening was impracticable, nor that the wire could not have been so located that it would not come in contact with employes walking upon the platform. Although plaintiff did not show a practice of other lines to screen feed wires near such overhead bridges—which evidence might be difficult to adduce, because defendant's system is not in general use—still the evidence raised a question of fact whether the exercise of due care did not require that some precaution should have been taken to minimize the danger to employes from this unprotected wire, contact with which was death.

Judgment and order reversed, and new trial granted, with costs to abide the event.

DONOVAN v. ALLIANCE ELECTRIC CO. ET AL.

(Supreme Court of New York. Appellate Division, Third Department. March 11, 1920.)

181 New York Supplement, 823.

2. MASTER AND SERVANT—FINDING THAT CLAIMANT SUFFERED FRACTURED SKULL HELD NOT SUSTAINED.

In a proceeding under the Workmen's Compensation Law to obtain compensation, a finding of the Industrial Commission that a certain accident was the cause of encephalitis, necessarily involving a finding that claimant suffered a fractured skull, was not sustained, where there was no evidence that the disease, encephalitis, commonly known as "sleeping sickness," was caused by a fractured skull, except a tentative diagnosis, when the case was partially developed, which was changed by the later history of the case; such tentative diagnosis having no probative force.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Kellogg, P. J., and Kiley, J., dissenting.

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Appeal from State Industrial Commission.

Proceeding by Joseph P. Donovan under the Workmen's Compensation Law (Consol. Laws, c. 67) to obtain compensation for personal injuries, opposed by the Alliance Electric Company, the employer, and the Ætna Life Insurance Company, the insurance carrier. There was an award of compensation by the State Industrial Commission, and the employer and insurance carrier appeal. Award reversed, and matter remitted to the Commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

James B. Henney, of New York City (William H. Foster, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The claimant on December 29, 1918, in the course of his employment, hit his head against a desk. He worked regularly thereafter until January 16, 1919. He is now suffering from encephalitis, commonly known as "sleeping sickness." The commission finds that this disease was "caused by a fracture to the base of the skull," sustained by him when he hit his head.

[1, 2] There is no evidence of a fractured skull. The evidence is to the contrary. At one stage of the disease the physician thought the symptoms indicated a fractured skull, but subsequent developments caused them to change their opinion. It cannot be that a tentative diagnosis in a partially developed case, subject to future developments, and which is changed by the later history of the case, has any probative force. At most a statement of a witness out of court, inconsistent with his testimony, discredits the witness, but is never received as evidence of the fact contained in such inconsistent statement. No physician in this case has ever testified to a fractured skull, and no physician connects the present disease with the blow to the head. The commission, in its effort to make such connection, has based its finding on the erroneous hypothesis of a fractured skull, of which there is no evidence.

I therefore think the award should be reversed and the matter remitted to the commission. All concur, except John M. Kellogg, P. J., and Kiley, J., who dissent.

JOHN M. KELLOGG, P. J. (dissenting). If we were reviewing the decision of a court in a common-law action, we might question whether the determination is fairly sustained by the evidence; but the statute prohibits us from reviewing the facts as determined by the Commission. If there is no evidence to sustain a finding, the finding is erroneous as matter of law, and we must reverse it. The moment we determine there is some evidence, then our power to consider the facts ceases.

The only question in this case, therefore, is: Is there any evidence tending to show that the accidental injury was the cause of the claimant's disability? It is quite immaterial what name we give to the malady. We are only interested in its cause. Claimant was a well man, working continuously, and was injured upon the head. Immediately his mental condition and actions changed. He was irritable and in constant pain and suffering, was treated at home, and in a few days was taken to the hospital. He was there examined by many competent and disinterested doctors, including Dr. Kennedy and Dr. Haywood. They all declared that he was suffering from a fracture at the base of the skull. Later Dr. Kennedy now says, he was called in two cases which he determined were "sleeping sickness," and in comparing this case with those he changed his opinion, and concluded that the claimant had "sleeping sickness," and

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his view seemed to have been impressed upon the other doctors.

Dr. Haywood and Dr. Kennedy were employed in this case as expert witnesses for the insurance company. Dr. Haywood, in speaking of his first diagnosis, swears:

"The case didn't fit definitely into any one particular group, and I wasn't certain of the diagnosis at the time; after we got a history of the blow on the head, it was reasonable to connect the injury with his condition at that time. * * * Donovan was seen by about six of the visiting medical men and surgeons of the hospital, and the consensus of opinion was that he had a fracture at the base of the skull; every one agreed to that at the time—that is, the symptoms could be all explained by such an injury. After a reasonable time, however, his symptoms didn't clear up; he didn't progress as a fractured skull should progress, and then other cases developed. There was another case in Bellevue, and Dr. Kennedy had seen a couple of cases on the outside, all of which fitted into one definite clinical picture, and it was then the diagnosis of encephalitis lethargica was made. * * Q. Had any injury like this anything to do with that, do you think? A. Well, I don't know—you can say 'yes' or 'no'; because the only way you connect a condition of this kind with such an injury would be by reducing the man's resistance as a result of the injury. We don't know what the causative factor is in sleeping sickness; nobody has proven it as yet. * * * The picture of a fracture at the base of the skull is negative anyway; there is seldom you can get a picture of a fracture at the base of the skull."

Dr. Kennedy swears as to "sleeping sickness":

"What is thought about it is that in certain periods, certain epochs, certain periods of time, a good many of us incur through one of the posteriornares the organism capable of producing this situation, and that if we get run down, etc., we may fall a victim—i. e., our immunization, as it were, breaks down, and we become a victim of the disease, same as has been proven in cerebrospinal fever. * * * Q. Doctor, from the examamination you have made and the literature you have read, do these so-called 'sleeping sicknesses' follow traumas or have any connection with them? A. No; I haven't seen any until this one in which that matter came up at all. I have seen about 13 now, and they were all straight illness as considered apart from injuries. * * * Q. Doctor, can you give any opinion as to whether this injury he had to his head had any connection with his condition? A. I don't like to be dogmatic about it, but the fact that in the other cases there was no connection with an injury, and the diagnosis being beyond doubt, makes me feel that the connection is one of time rather than causation. I wouldn't say there was no connection."

It must be remembered that these two physicians, at the time they made the original examination and diagnosis, were entirely disinterested, and at the time of the trial, at least, were the paid physicians of the insurance company. The question of their interest and their change of diagnosis was a proper matter for the careful scrutiny of the commission, and its determination as to the effect to be given to their testimony was a question of fact which we cannot review. The claimant was not represented by counsel at the hearings. It is apparent that it cannot be said with certainty that a patient suffered from a fracture at the base of the skull or from "sleeping sickness" until an autopsy is made. It is common experience that, where the disease is obscure, a wrong diagnosis may be made, and this case proves that rule.

The co-called "sleeping sickness" is not well understood. It is a very obscure disease. No one knows its cause. It is not clear that it does not at times result from traumatism. The hospital records stand in the case as some evidence that the disability arose from a fracture at the base of the skull. The claim filed shows the same thing. The original report of the examining physician is to the same effect. We

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see that the doctors disagree with themselves. The fact, however, remains that a well man received an injury upon the head, and there was an immediate change in his mental condition and his actions; his condition grew worse from day to day. The natural inference is that the accidental injury to the head must have had some effect in producing the present condition. The fact that so many able physicians all united in an opinion after examining the patient is some evidence i favor of the claimant. We know so much about experts, and the fallibility of all of them, that good common sense rises in value, and the common sense of this case is that the injury to the head and the immediate change in the mental condition of the man were not remarkable coincidences, but were cause and effect. There may be a feeling that the law goes too far in saying that the decision of the commission on questions of fact is final; but if the law is at fault, the Legislature, and not the courts, should remedy it.

In my judgment there is some evidence, and no reversible error appears. I therefore favor affirmance.

Kiley, J., concurs.

GISNER v. DUNLOP ET AL.

(Supreme Court of New York. Appellate Division, Third Department. May 5, 1920.)

181 New York Supplement, 789.

MASTER AND SERVANT — EMPLOYEE HELD NOT ACTING WITHIN EMPLOYMENT, SO AS TO ENTITLE BENEFICIARY TO COMPENSATION.

Where a farm employee was given permission to go to the cobblers to get a pair of heavy shoes before going to the woods to work as directed, but before going for his shoes went to a saloon, and was killed by an automobile while going from there to the post office for his own purposes, he was not acting within his employment when killed, and his beneficiaries are not entitled to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Appeal from State Industrial Commission.

In the matter of the claim of Margaret J. Gisner for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67) for the death of George Gisner, against Hugh Dunlop, employer, and the Travelers' Insurance Company, insurance carrier. From an award of compensation by the Industrial Commission, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Amos H. Stephens, of New York City (E. C. Sherwood, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

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JOHN M. KELLOGG, P. J. The employer was carrying on a small farm and a small trucking business. He kept two teams. The farm was used principally in furnishing supplies for the farm and teams. The farm work, in great part, was done by the employer; the trucks were driven by the employe. Occasionally the employe helped on the farm, and sometimes the employer drove a truck. On the day in question the employe said in the morning he had some errands to do for himself and would not work in the forenoon; he said he would take some shoes over to the shoeshop and have them fixed. He returned about noon and began work in doing chores on the farm. It was then understood that they were to go to the coalyard and get a load of coal, and then to the woods to get a load of wood for the farmhouse.

As they were about ready to start for the coal, the employe said that he ought to have his heavy shoes, which were at the shoemakers, and he was told he could get them, and then meet the employer at the coalyard, unless he overtook him on the way. Instead of going directly to the shoemakers, the employe went to a saloon, and from there started for the postoffice, when he collided with an automobile upon the street and sustained injuries, from the result of which he died in a few days. Evidently he had not visited the shoeshop at all. The farm from which the employer and employe started was about 10 minutes' walk from the shoeshop. The employer drove to the coalyard and was loading the coal alone, when he was informed of the accident. Undoubtedly the heavy shoes were more suitable for work in the woods than the lighter ones; but the employe was upon his own errand when he started for the shoeshop and intended to there change the lighter for the heavier shoes. It cannot be said that he was obeying instructions from his employer; the employer permitted him, but did not direct him, to do the errand. He could have performed his service in the woods for the employer just as well without the heavy shoes; it was to save the employe the inconvenience of getting his feet wet that he was permitted to exchange his shoes. When he went to the saloon, and was going from it to the post office, it was for his own purposes, and he was not then acting within his employment. Culhane v. Economical Garage Co., 188 App. Div. 1, 176 N. Y. Supp. 508.

The award should be reversed, and the claim dismissed. All concur.

GRAFFE et al. v. ART COLOR PRINTING CO. et al.

(Supreme Court of New York. Appellate Division, Third Department. May 5, 1920.)

181 New York Supplement, 707.

MASTER AND SERVANT—AWARD OF COMPENSATION FOR DEATH FROM FALL ON OBSTRUCTED FLOOR HELD WARRANTED.

Compensation properly awarded for death of employee of color printing establishment, who was found, on concrete floor, with fractured skull, between two rolls of paper, where there were other obstructions over which he might have tripped, in an odor and gas impregnated dark room, by other workmen of night shift returning from recess for lunch.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from State Industrial Commission.

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Proceeding by Anna Graffe and her minor children under the Workmen's Compensation Act (Consol. Laws, c. 67) for compensation for death of her husband, Felix Graffe, the employee, opposed by the Art Color Printing Company, the employer, and the Ætna Life Insurance Company, insurance carrier. Compensation was awarded by the Industrial Commission, and the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

James B. Henney, of New York City, for appellants.
Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondents.

KILEY, J. On the 19th of November, 1917, Felix Graffe, husband of the plaintiff, was working, night shift, for the Art Color Printing Company of New York City. The men shut down at 10 p. m. and went out to lunch; Graffe went with them. They returned at about 10:45 p. m., and they saw deceased lying on his back between two rolls of paper. His skull was fractured; the floor where he fell was concrete; he was taken to the hospital, and died in a few hours. The commission awarded his widow and minor children compensation; later it reversed the award, and still later, by divided vote, reversed its reversal, and reinstated the award.

The appellants contend that there is no evidence of an accident authorizing such award, and cite Matter of Collins v. Brooklyn Gas Co., 171 App. Div. 381, 156 N. Y. Supp. 957, and Matter of Hansen v. Turner Construction Co., 224 N. Y. 331, 120 N. E. 693, as decisive against respondents. In 171 App. Div. 381, 156 N. Y. Supp. 957, the deceased was assistant foreman, and while sweeping the paving near the works he fell, and later died in the hospital. The theory of claimant in that case was that escaping gas caused him to faint. He had said to a fellow employe that "a weak spell must have come to him." The evidence showed absence of any effect from gas, and the theory was abandoned, and the commission found the decedent stumbled and fell, and thus received his injury.

There was no evidence of any obstruction. The Hansen Case, 224 N. Y. 331, 120 N. E. 693, is in many respects like this case; but in that case there was total absence of evidence of anything, in the nature of obstruction, of pillars or posts, near him, that should cause him to fall. In the present case several facts, connected with the employment, of conditions that might have caused Graffe to fall and fracture his skull, appear: The concrete floor, grease upon the floor about the press at which he worked, rolls of paper three feet in diameter lying lengthwise on the concrete, with metal bar extending 12 to 14 inches out of either end, over which he could trip: absence of light, except one light 30 feet away, dark around the press where he worked and was found; the presence of noxious, enervating, and pernicious odor and gases; and close and tepid atmosphere, kept so continuously and purposely on account of the effect fresh air or moving draughts had upon the colors that were being stamped upon the paper—all of which was connected with the employment and business, and which the evidence shows might have been the cause of the fall of the decedent. We think the decision in Shludzinski v. Standard Oil Co., 176 App. Div. 87, 162 N. Y. Supp. 225, sustains the award of the Commission in the case at bar.

The award should be affirmed. All concur.

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INTINI ET UX. v. STITTVILLE CANNING CO. ET AL.

(Supreme Court of New York, Appellate Division, Third Department. March 11, 1920.)

181 New York Supplement, 890.

MASTER AND SERVANT—FATHER AND MOTHER NOT BOTH ENTITLED TO COMPENSATION FOR DEATH.

The father and mother of a deceased employee *held* not both entitled to compensation for his death as dependents.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from State Industrial Commission.

Proceeding by Pietro Intini and wife, by the Royal Italian Consul, for compensation under the Workmen's Compensation Act (Consol. Laws, c. 67) for the death of their son, Nicolo Intini, opposed by the Stittville Canning Company, employer, and the Utica Mutual Insurance Company, insurer. Compensation was awarded, and defendants appeal. Affirmed in part, and reversed in part.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Hart, Stevenson, Walton & Senior, of Utica, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York City, of counsel), for State Industrial Commission.

KILEY, J. In this case the award was made to the father and mother, as dependents of the deceased, $2.885 each, weekly. In the Matter of Sharpeletzos v. Counes & Raptis Corporation (recently decided in the Court of Appeals) 228 N. Y. 46, 126 N. E. 268, such award is disapproved—viz. cannot be made to both. Under the authority of that case, the award to the father, Pietro Intini, of $2.885 weekly, should be affirmed, and the award to the mother reversed, and the claim as to her dismissed. All concur.

MINERLY v. KINGSBURY CONST. CO. et al.

(New York Supreme Court, Appellate Division, Third Department. May 5, 1920..)

181 New York Supplement 901.

1. MASTER AND SERVANT—CAUSE OF DEATH CANNOT BE PRESUMED UNDER COMPENSATION LAW.

In a proceeding under Workmen's Compensation Law to obtain compensation for the death of servant, the cause of accident cannot be presumed, but must be established.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

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2. MASTER AND SERVANT—DEATH BY DROWNING DID NOT "ARISE OUT OF EMPLOYMENT," UNDER COMPENSATION LAW.

In a proceeding under the Workmen's Compensation Law to obtain compensation for the death of a servant, *held*, that servant, subject to fits, who was drowned in 5 feet of water, did not meet his death in an accident arising out of the employment; the only reasonable inference being that he was overcome by an attack of his constitutional malady.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from State Industrial Commission.

Proceeding by Charlotte Minerly under the Workmen's Compensation Law to recover compensation for the death of Henry Minerly, opposed by the Kingsbury Construction Company, employer, and the Travelers' Insurance Company, insurance carrier. There was an award of compensation, and the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Amos H. Stephens, of New York City (E. C. Sherwood and William B. Davis, both of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen .(E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The question in this case is whether the accident arose out of the employment. The deceased employe was engaged with others in leveling a pile of stones which had been thrown up near a river bank by a dredge at Mechanicville, N. Y. While so working, he was stricken with a fit, to which malady he was subject. He came out of the fit and resumed his usual work. A short time thereafter he proceeded up the river bank for a purpose incidental to his employment. Not returning, his fellow employes instituted a search for him, and discovered his dead body in the river in a depth of 5 feet of water. His death was caused by drowning. No feature or incident of his work required him to enter the water at that place. His body, when found, was "all curled up" in about the same condition as it was when he had the fit shortly before, at which time he was also described as "lying all curled up." The place of his death was 100 or 150 feet from where his fellow employes were engaged in their work. On these facts the commission by a closely divided vote has found that the accident arose out of the employment.

[1, 2] The cause of the accident cannot be presumed, but must be established. Matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254; Matter of Collins v. Brooklyn Union Gas Co., 171 App. Div. 381, 156 N. Y. Supp. 957; Matter of White v. American Society for Prevention of Cruelty to Animals; 191 App. Div. 6, 180 N. Y. Supp. 867; Matter of Nestor v. Pabst Brewing Co., 191 App. Div. 312, 181 N. Y. Supp. 477; Matter of Woodruff v. R. H. Howes Construction Co., 228 N. Y. 276, 127 N. E. ——. Even if the presumption of section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67) should apply, the circumstances surrounding the accident would seem to constitute 'substantial evidence" sufficient to overcome the presumption. It seems unreasonable to infer that a well and able-bodied man could have drowned under the circumstances here existing.

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As stated above, there was no occasion for the deceased to enter the water. It is not suggested that there was a dock or embankment, from which he could have fallen into water of any considerable depth. An ordinary man would not be submerged in water 5 feet deep, and would experience no difficulty in reaching the shore, only a few feet distant. No outcry or alarm was heard by the fellow workmen of the deceased, who were within easy hailing distance. The only reasonable inference is that he was overcome by another attack of his constitutional malady, and because thereof fell from the river bank into the water. This theory harmonizes with all the evidence in the case, and is the only reasonable explanation of the accident. The case is similar in this respect to Matter of Hansen v. Turner Construction Co., 224 N. Y. 331, 120 N. E. 693. If there were other circumstances bearing favorably on the claim, it was incumbent on the claimant to prove them. On the evidence produced, the accident did not arise "out of" the employment.

The award should be reversed, and the claim dismissed. All concur

NESTOR v. PABST BREWING CO. et al.

(Supreme Court of New York, Appellate Division, Third Department. March 11, 1920.)

181 New York Supplement 477.

3. MASTER AND SERVANT—AWARD UNDER COMPENSATION ACT MUST REST ON LEGAL FOUNDATION, NOT PRESUMPTION.

A finding of the Industrial Commission in favor of claimant, under the Workmen's Compensaton Act, as to the cause of an injury to a workman, must rest on legal foundation, and not on presumption.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

4. MASTER AND SERVANT—FINDING THAT DEATH WAS CAUSED BY DISEASE INCREASED BY ACCIDENT WITHIN COMPENSATION ACT HELD NOT WARRANTED.

In a proceeding under the Workmen's Compensation Act, a finding of the Industrial Commission that a deceased employee, who never resumed work after an injury and died after a fall in the street, died as a result of valvular heart disease, which condition was aggravated by previous injury, *held* not warranted.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

In the matter of the claim of Delia Nestor, under the Workmen's Compensaton Act, for he death of Andrew Nestor, against the Pabst Brewing Company, employer, and the Standard Accident Insurance Company, insurance carrier. From an award of the Industrial Commission for claimant, the employer and insurance carrier appeal. Award reversed, and matter remitted to Commission.

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Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Neile F. Towner, of Albany, for appellants.
Charles D. Newton, Atty. Gen., and E. C. Aiken, Deputy Atty. Gen., for State Industrial Commission.

COCHRANE, J. The question in this case is whether any causal relation between the injury and death of the deceased has been established. On June 1, 1918, Andrew Nestor, the husband of the claimant, sustained injuries consisting of a dislocated shoulder and contusions. The dislocation was immediately reduced, and he remained under the care and treatment of a physician until July 5, 1918. He never resumed work. On July 21, 1918, he fell in the street and was assisted to his home, where he died the same day, without medical attendance. The death certificate filed in the department of health of the City of New York recited that "the chief and determining cause of his death was chronic cardiac valvular disease." The finding of the commission, connecting the death with the accident, is as follows:

"The cause of death is given as 'chronic cardiac valvular disease.' The injuries sustained on June 1, 1918, so aggravated a previously existing heart lesion as to bring about decompensation and an acute condition which resulted in the death of Andrew Nestor on July 21, 1918."

[1-4] There is absolutely no evidence that the deceased had a heart lesion at the time of the accident. There is no evidence that the cause of death was heart disease, unless it be the death certificate. It is stated that this constituted some evidence of such fact; but, if so, it was only presumptive evidence of the facts therein stated. And a presumption disappears in the presence of substantial evidence to the contrary. Rose v. Balfe, 223 N. Y. 486, 119 N. E. 842, Ann. Cas. 1918D, 238; Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78; Fallon v. Swackhamer, 226 N. Y. 447, 123 N. E. 737. The only physician called as a witness was Dr. Smith, who treated the deceased from June 3, 1918, until July 5, 1918, always at his office, where the deceased went to receive such treatment. He examined his heart twice during that time and found no difficulty therewith. On the latter date he discharged the patient. When he discharged him, he did not think the deceased had any condition which would cause death in a short time. When the death certificate was called to the attention of the physician, he testified that he did not think the injury had anything to do with his death. He further testified:

"I don't think he died with the cause of death as written on that death certificate. I don't think that is the real cause of death. * * * There is nothing in this injury, as far as I could see, that could have anything to do with it."

The widow of deceased testified that he never had heart trouble or was sick before the injury. It appears that the person who signed the death certificate had never seen the deceased during life. He was not present at death, nor for three hours thereaftr. No physician saw him within 16 days of his dath. No autopsy was performed after death. Nor do the circumstances, reasons, or facts appear on which was based the statement that the cause of death was cardiac valvular disease. And, furthermore, the certificate bears on its face a notice that—

"The department of health of the City of New York does not certify to the truth of the statement made thereon, as no inquiry as to the facts has been provided for by law."

The certificate, being at most presumptive evidence only, is entirely destroyed by the testimony of Dr. Smith and the circumstances under which it was made. The finding above set forth, in order to sustain

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the award, must rest on a legal foundation. It cannot be presumed, but must be proved. Matter of Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735; Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507; Ann. Cas. 1918B, 540; Matter of Eldridge v Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254. The error of the commission consists in basing its conclusion solely on the unsupported and uncorroborated death certificate, which certificate, constituting only presumptive evidence, was conclusively overcome by the other evidence in the case, under the authorities cited.

The chief medical examiner of the commission rendered an opinion, but it does not supply the deficiency, first, because his opinion was not given as evidence, with any opportunity for cross-examination, but was furnished to the commission outside of the hearing; and, second, because his opinion assumes the cause of death as stated in the death certificate, and is based thereon. The commission accepted this opinion and made its findings accordingly. The commission and its chief medical examiner both fell into the same error.

If the commission had disregarded the death certificate, and had merely found that death resulted from the accident, basing such finding on the fact that the deceased was in good health at the time of the accident, and was in poor health from that time until the time of his death, a different question would be presented. The difficulty is that the commission has not adopted that theory, but, on the contrary, has found as a fact inconsistent therewith that he was not in good health at the time of the accident.

The award should be reversed, and the matter remitted to the commission.

Woodward, Henry T. Kellogg, and Kiley, JJ., concur.

John M. Kellogg, P. J. (dissenting). I fear we are overlooking sections 20 and 68 of the Workmen's Compensation Law (Consol. Laws, c. 67). The former provides, in substance, that the decision of the commission shall be final as to all questions of fact; the latter that the commission is not bound by common-law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided in that law, "but may make such investigation or inquiry or conduct such hearing in such a manner as to ascertain the substantial rights of the parties."

We cannot say that the certificate of death is entirely hearsay evidence. It is a certificate required by law (Public Health Law [Consol. Laws, c. 45] §§ 373, 377, 394, and Greater New York Charter [Laws 1901, c. 466] §§ 1179, 1203, 1238, 1570 et. seq.), and is evidence even in an ordinary action (Code Civ. Proc. § 922). We are not acting upon a mere presumption created by the statute, which may disappear when evidence to the contrary is produced, but upon a certificate of death, made and filed according to law, and which is legal evidence in all courts. Since the origin of the Workmen's Compensation Law such certificates have always been given probative force by the commission. If the company's physician, by paid testimony which the commission does not credit, can absolutely annihilate the death certificate which the commission believes to be true, it is a startling proposition. The commission, when the case is closed, may consider all the evidence, and is to weigh the evidence, and any evidence legally received may be given such force and effect as it deserves, especially since this law provides that the commission's findings of fact are final. We cannot repeal any part of the statute, but must enforce every part of it according to its real spirit.

The certificate was complete in itself and was properly certified. After the assistant registrar of records certified the certificate to be a true copy of the one on file, there was printed upon the blank below his signature a statement that the department of health does not cer-

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tify to the truth of the statements made in the death certificate, as no inquiry as to the facts had been provided for by law. This means that it was the certificate of the physicians making it, and that the board itself was not responsible for the facts certified. That note did not belittle in any way the force which the statute gave to the death certificate.

The question before the commission was not whether the death was the result of a chronic cardiac valvular disease, but was whether death was the result of the injury sustained. The facts are very simple. The employe was leading three horses from the stable; one "got wild," and they pushed him down and trampled upon him, injuring him severely in several places, dislocating his shoulder, fracturing his arm, and injuring him about the chest, leaving a black mark thereon about the size of a small plate, indicating that a horse had jumped upon it. There were several other black marks upon his body and upon one arm the mark of a horse's shoe was apparent. He had worked continuously up to that time, and was apparently in good health. After the injury he was unable to do anything, suffering pain all the while, especially in the chest, and complaining that he was injured internally and wanting an X-ray taken, so that he could see what was the matter inside his chest. The company's physician, who examined him shortly after the injury, swears that he found no trouble with the heart, and he thinks the death certificate does not properly state the cause of death. He is unable, however, to give any cause himself. The widow testified that the doctor made no examination of the chest or heart, but simply came in and looked at the patient and told him he would be all right in a few days, giving him no medicine. He apparently was there as a witness for the insurer, and not as a doctor for the patient. Dr. Smith's evidence is discredited by the death certificate, the testimony of the widow, and by the death under circumstances which seem to show that the death certificate was right and the doctor wrong. It is difficult to see how the commission could have found otherwise than that the death resulted from the injury. But we are not interested in that question; the sole question before us is: Was there some evidence which tends to sustain the award? If so, it is conclusive.

The commission, in its findings, refers to the cause of death as stated in the certificate; but its conclusion is that the injuries sustained "so aggravated a previously existing heart lesion as to bring about decomposition and an acute condition, which resulted in the death." The fact that he was in apparent good health prior to the injury, and that the wife knew of no heart trouble, is not of much significance.

I favor an affirmance.

ROSKIE v. AMSTERDAM YARN CO. et al.

(New York Supreme Court, Appellate Division, Third Department. May 5, 1920.)

181 New York Supplement 891.

MASTER AND SERVANT—INDUSTRIAL COMMISSION ERRED IN DIVIDING WEEKLY WAGE BY 5½ TO DETERMINE DAILY WAGE.

In awarding compensation to injured employee, who worked, in week of 54 hours, five 10-hour days and 1 4-hour day (Saturday), Industrial

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Commission erred in determinig that employee worked only 5½ days a week, and that his weekly wages must be determined by dividing wage by 5½ to find daily wage, and then by multiplying such average daily wage by 300 to find annual earnings, and then by dividing such sum by 52, and awarding compensation on basis of average weekly wage so determined. Employee worked some part of 6 days, and what he could actually earn in that time was his weekly wage.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Appeal from State Industrial Commission.

In the matter of the claim of Alec Roskie, the employee, for compensation under the Workmen's Compensation Law, opposed by the Amsterdam Yarn Company, the employer, and the American Mutual Liability Insurance Company, insurance carrier. Compensation was awarded by the State Industrial Commission, and the employer and insurance carrier appeal. Award reversed, and matter remitted to the Industrial Commission to adjust compensation.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Jeremiah F. Connor, of New York City, for appellants.

Charles D. Newton, Atty Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The claimant has been awarded $15.08 per week for a period of 244 weeks for the loss of a hand. There is no question as to the injury, or the liability of the employer and the insurance carrier, and the only question presented is the rule governing the determination of the weekly wages of the claimant.

It appears from the record that, with a basic week of 54 hours, the employes of the Amsterdam Yarn Mills have worked 10 hours per day for 5 days, and 4 hours on Saturdays, and these were the hours of the claimant. The claimant had been at work only 3 weeks at the time of the accident, and it became necessary to resort to the rule laid down in subdivision 2 of section 14 of the Workmen's Compensation Law (Consol. Laws, c. 67), and the schedule of wages of a fellow employe, one Charles Morrell, was filed with the commission, showing his wages for a period of 45 weeks, amounting to $969.31. This was at the rate of $21.54 per week, and it is conceded that these earnings fairly represented those of similar employes with the claimant. The commission, starting with this average weekly wage of $21.54, divided it, not by the 6 working days of the week, but by 5½ days, making the average daily wages $3.92, and then, by multiplying this average daily wage by 300, it arrives at a total of $1,176 as the annual earnings of the claimant. Dividing this sum by the 52 weeks of the year the average weekly wage, which started at $21.54, has been increased to $22.61, and the commission has fixed the compensation at two-thirds of this sum, or $15.08 per week, while, if the original division had been made by the 6 days of the week, the result would have been an award of $13.84, or a total difference of $309.88 for the term of 244 weeks.

It does not appear from the record that Charles Morrell worked any other or different hours than the claimant. Presumptively he worked 10 hours per day for 5 days and then 4 hours on Saturdays, the same as the claimant. There does not appear to have been any calculation on the basis of 5½ days in fixing his weekly wages; but when it came to the claimant the commission set up a new rule, and determined that he only worked 5½ days a week, and that his daily wages must be determined on this basas. This is obviously an erroneous rule. The

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week which employes were called upon to work consisted by usage of five 10-hour days and one 4-hour day. In other words, the day's labor consisted of 9 hours' application, or 54 hours for the week, while the usage of this particular mill—brought about principally by the employes themselves in conjunction with others—was to divide the time as set forth. But the contract of employment was for a week of 54 hours, and the manner in which this was accomplished did not operate to limit the employment to 5½ days. As said by the United States Supreme Court (Renner v. Bank of Columbia, 9 Wheat. 581, 585, 6 L. Ed. 166):

"The common law knows of no fractions of a day; custom, however, and that introduced, too, principally by banks, has limited the day to a few hours of business."

And this custom enters into the contract. The question before the commission was, not how the employes divided up the week, but what was the earning capacity of the claimant per week. He worked some part of 6 days, and what he could earn in that time was the weekly wages of the employment. "The award should not exceed two-thirds of the earning capacity." Matter of Littler v. Fuller Co., 223 N. Y. 369, 372, 119 N. E. 555. The true test, say the court in the case cited, is:

"What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness?"

The award should be reversed, and the matter sent back to the State Industrial Commission, to adjust the compensation upon the basis of the weekly earnings of the claimant or his representative employe.

All concur.

VAUGHN v. BARNET LEATHER CO. et al.

(New York Supreme Court, Appellate Division, Third Department. May 5, 1920.)

181 New York Supplement 721

MASTER AND SERVANT—FINDING OF AVERAGE WEEKLY WAGE OF COMPENSATION CLAIMANT UNWARRANTED.

In a proceeding, under the Workmen's Compensation Act, by a rolling machine operator, evidence *held* insufficient to sustain a finding that claimant made an average weekly wage of $28.84; it appearing that her regular wages were $2.50 per day.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from State Industrial Commission.

Proceedings under the Workmen's Compensation Act (Consol. Laws, c. 67) by Ella Vaughn, opposed by the Barnet Leather Company, employer, and the Utica Mututal Insurance Company, insurance carrier. Claimant obtained an award from the State Industrial Commission, and employer and insurance carrier appeal. Reversed and remitted to State Industrial Commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

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Hart, Stevenson, Walton & Senior, of Utica (A. G. Senior, of New York City, of counsel), for appellants.

Bronner & Ward, of Little Falls (J. C. Bronner, of Little Falls, of counsel), for respondent

Charles D. Newton, Atty Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The claimant was injured while at work on a rolling machine in the Barnet Leather Company's factory, and there is no question as to the character of the injuries. The State Industrial Commission has found that the average weekly wages of Ella Vaughn was the sum of $28.84, and the award is of $16.23 per week for 21 weeks, and the case held open to determine later the full extent of the injury. The insurance carrier and the employer, on this appeal, contend that the finding that the average weekly wages of the claimant was $28.84 is without support in the evidence, and we agree with this contention.

The evidence of the claimant herself is that she was receiving at the time of the injury $2.50 per day, and this is corroborated by the pay rolls of the Barnet Leather Company. It appears from the evidence that on the 13th of January, 1919, there was a strike of the male employes of the company; that the men who were operating the machines, such as the claimant was operating at the time of her injury, were being paid for piece work; and that some of them earned from $23 to $27 per week. On the 30th day of January the claimant was called from a room where she was earning between $10 and $11 per week, and was instructed in the operation of the rolling machine. After a short period of instruction she was left to operate the machine alone, and received the injuries for which the allowance is made.

Aside from some vague testimony from a foreman, that so far as he knew it had been the custom in that mill to put men at piece work after a few weeks of experience, there was no evidence to show that there was any understanding on the part of the claimant or her employer that the wages should be other than $2.50 per day. The claimant did say that there was one woman working in a different department, upon a different machine, who was getting $33 per week; but the name of the woman was not disclosed, nor was there anything to indicate that this was the customary wages of employes on the class of machines on which the claimant was at work, and the undisputed testimony was that three other women, employed upon these machines, were paid not to exceed $2.50 per day. The claimant was concededly working at the rate of $2.50 per day; she had not had sufficient experience to be put on piece work, even under the practice which prevailed among the men prior to the strike, and there is absolutely no evidence in the case from which the figures found by the State Industrial Commission can be supported. The highest figures shown by the evidence for any of the men for any sustained period of time was $25.83 per week, and the undisputed evidence is that there is now no piece work done on these machines, that none was being done at the time of the accident, and that the wages paid to the women operatives was $2.50 per day.

So far as we can discover from a reading of the testimony, the finding of the average weekly wages of the claimant is purely arbitrary; there is no evidence to suggest or support the sum of $28.84, and the case should be sent back for correction in this regard.

The award appealed from should be reversed, and the matter remitted to the State Industrial Commission. All concur.

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RAUSCH et al. v. STANDARD SHIPBUILDING CORPORATION et al.

(New York Supreme Court, Trial Term, Kings County. April 16, 1920.)

181 New York Supplement 513.

2. MASTER AND SERVANT—INJURY WHILE TRANSPORTED FROM WORK AT GOVERNMENT'S EXPENSE NOT ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where the working day of employees in a shipyard, which could only be reached by boat, began and closed at the shipyard, an employee killed while conveyed in a boat chartered by employer at the order and expense of the government, after having completed his week's work and receiving his pay therefor, did not die from injuries which arose "out of and in the course of his employment," within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Action by Annie Rausch, administratrix of Charles Rausch, deceased, against the Standard Shipbuilding Corporation and the Albany & Troy Steamboat Company, Limited. Verdict for plaintiff against the first named defendant, and against plaintiff as to the second named defendant. The first named defendant moves to set aside verdict against it, and for a dismissal of the complaint; and plaintiff moves to set aside verdict as to the last named defendant, and for a new trial. Both motions denied.

J. S. Jones, of Brooklyn, for plaintiff.

W. L. Kiefer, of New York City, for defendant Standard Shipbuilding Corporation.

M. A. Tierney, of Troy, for defendant Albany & Troy Steamboat Co., Limited.

VAN SICLEN, J. [1] Plaintiff has a verdict in her favor against the Standard Shipbuilding Corporation, and against her as to the defendant Albany & Troy Steamboat Company. The defendant Standard Shipbuilding Corporations moves to set aside said verdict against it and for dismissal of the complaint, and the plaintiff moves to set aside the verdict as to the other defendant Albany & Troy Steamboat Company, Limited, and for a new trial. The verdict of the jury was rendered after a protracted trial, in which the issues raised by the respective parties were litigated at length. Such a verdict should not be disturbed by the trial court unless clearly against the weight of evidence or contrary to settled law.

Plaintiff, as administratrix, seeks to recover money damages for the death of her intestate on account of negligence of both defendants; such alleged negligence being confined to the repair of a certain steam pipe connected with the boiler of the defendant Albany & Troy Steamboat Company's boat, which had been leased to or chartered by the defendant Standard Shipbuilding Corporation. Upon the trial the plaintiff proved that her intestate met his death by reason of the blowing out of the steam pipe in question; that shortly before certain repairs had been made to said pipe by the employes of the defendant Standard Shipbuilding Corporation at the request and for and under the direction of the Albany & Troy Steamboat Company; that the same had been poorly, negligently, and defectively made; and that said boat in such

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defective and dangerous condition was used by the defendants as aforesaid to transport plaintiff's intestate and other employes of the defendant Standard Shipbuilding Corporation to and from Shooters Island, their place of employment.

The repair to the steam pipe referred to was admitted by both defendants, but they sharply disputed the method and manner, and the condition both before and after the said repairs, and of the boiler and appurtenances, as well as the responsibility and liability for the explosion or blow-out which resulted in the death or injury to several of those on board. As between the two defendants, the jury has found that the Standard Shipbuilding Corporation, the employer of plaintiff's intestate, the charterer of the boat, and whose men actually made the repairs, alone was liable. Plaintiff's complaint and proof of negligence being only as to said repair, this court cannot say that the verdict is clearly against the weight of evidence, and therefore must not, under the authorities, attempt to substitute its judgment for that of the jury.

The motion of the defendant Standard Shipbuilding Corporaion to set aside the verdict and for a dismissal of the complaint raises a more serious and complicated question. Said defendant pleaded, and throughout the trial insisted, that any claim that plaintiff might make against it was under and pursuant to the Workmen's Compensation Act (Consol. Laws, c. 67), and the plaintiff had no claim against it otherwise. When interrogated by the court, said defendant's counsel placed in the record the concession that said defendant would acknowledge the validity of such claim under said act if applied for to the proper commission or authority. Plaintiff's counsel insists that, at the time of the accident, plaintiff's intestate was not such an employe or servant of the defendant Standard Shipbuilding Corporation within the contemplation or covered by the provisions of the Workmen's Compensation Act, and that the plaitniff has clearly stated and proven a cause of action at common law against said defendant. The solution of the problem will be found in the answer to the question:

"Did plaintiff's intestate come to his death from injuries received or drowning which 'arose out of and in the course of his employment'?"

If the affirmative holds, plaintiff is relegated exclusively to relief under said act. There is little dispute as to the main facts. Plaintiff's intestate was employed by the defendant Standard Shipbuilding Corporation at its yard on Shooters Island, access to which was by boat only. Prior to the chartering of the Julia Safford, there were some four other boats or ferries operating between this island and New Jersey, Staten Island, and New York City, for the transportation of workmen to and from said island, and after some of the men had made complaint with regard to the inadequacy of said transportation to the Emergency Fleet Corporation (the said defendant Standard Shipbuilding Corporation being engaged in building ships for the United States government), the said Standard Shipbuilding Corporation was directed to provide additional transportation, which it did by hiring or chartering the Julia Safford, and for which it was reimbursed by the government. The workmen carried in this manner paid nothing for the transportation until after the government work ceased; then the contract or arrangement was terminated. At the time of the accident in question, the workmen's day's work began and closed at Shooters Island, and not at the time they embarked or landed at the mainland. Plaintiff's intestate came to his death on the return trip of the Julia Safford from Shooters Island to Brooklyn on the 20th day (Saturday) of September, 1918, after the completion of the week's work and payment therefor.

Defendant Standard Shipbuilding Corporation contends that the status of an employe, when injured while being transported to and from his work, has been definitely fixed and finally determined by the Court of Appeals. Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554. An

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examination of said case reveals that it arose out of an application by the injured employe to the commission for compensation by his employer under and as provided by the act At the time the employe in that case received the injury complained of, he was being conveyed by automobile from his place of work in the country to the railroad station. The court found that the conveyance by automobile to and from the place of employment—a building in course of erection—was included in the contract of employment, and was necessary in order to secure or retain the services of the employe. It also found, by inference, that the employe's day's work began when he entered the automobile in the morning and ended when he left it in the afternoon at the station, and that his pay was measured by the elapsed time. Such being the case, it could easily follow that the commission and the court were justified in finding that the place of injury was brought within the scope and bounds of and incidental to the employment, and within the control, conveyance furnished, and precincts of the employer, and therefore covered by the act. However, in that form of litigation, between employe and employer and the latter's insurance carrier, there has been a pronounced extension of the meaning of these terms so far as contemplated by the act. The decision (Littler v. Fuller Co., supra) closely follows the English and Massachusetts cases (Donovan's Case, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778) See, also, De Voe v. N. Y. State Railway Co. 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917A, 250; Pierson v. Int. R. T. Co., 184 App. Div. 678, 172 N. Y. Supp. 492, affirmed 227 N. Y. 114 memoranda, 126 N. E. ——; Buynofsky v. Lehigh Valley Rd. Co. (N. Y. Court of Appeals, March 9, 1920) 126 N. E. 714.

[2] In the instant case, however, there appear facts which provoke a different situation, and naturally the question presents itself:

"Would the said Industrial Commission and the courts, upon the application of the defendant to compel the plaintiff to accept the remedy provided by the act and limit her to the same, hold that the death of plaintiff's intestate 'arose out of and in the course of his employment'?"

Concededly plaintiff's intestate's hours of work had expired, his work for the day and the week was over, and he had received his pay therefor; he was being conveyed in a boat hired or chartered by the defendant Standard Shipbuilding Corporation from the co-defendant Albany & Troy Steamboat Company at the order or direction and expense of the government and not of the Standard Shipbuilding Corporation, and which expense in no wise figured in the pay or wages of the plaintiffs intestate. To say that the death of plaintiff's intestate arose out of and in the course of his employment, and within the precincts of his then or theretofore employer, the Standard Shipbuilding Corporation, seems to be extending the compass of the act to even a greater degree than in any case cited or which has come to the notice of this court. Under the cricumstances, plaintiff having a verdict, the burden of establishing a precedent or making new law should be upon the defeated party.

Plaintiff's motion to set aside verdict as to the defendant Albany & Troy Steamboat Company, denied, with exception to plaintiff; defendant Standard Shipbuilding Corporation's motion to set aside verdict denied, with exception; 30 days' stay, and 60 days to make and serve case, granted to the party or parties appealing.

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BOYLE v. A. C. CHENEY PIANO ACTION CO.

(New York Supreme Court, Trial Term, Rensselaer County. Feb., 1920.)

181 New York Supplement 668.

MASTER AND SERVANT—COMPENSATION LAW DOES NOT REQUIRE "LEGAL" CONTRACT OF EMPLOYMENT.

In view of the Workmen's Compensation Law, which by section 11 swept away all common-law actions, and established a new and summary tribunal for the recovery of damages arising out of injuries to employees, the doctrine that relation of employer and employee does not exist, unless the employment is a "legal" one, violates the spirit of the statute and reads into it a provision not intended by the Legislature.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Action by Vincent Boyle, an infant, against the A. C. Cheney Piano Action Company. Motion for judgment on the pleadings granted.

W. E. Fitzsimmons, of Albany, for plaintiff.
Ainsworth, Carlsile, Sullivan & Archibald, of Albany, for defendant.

HOWARD, J. No formal statement having been dictated to the stenographer at the time this motion was granted, this brief, rather extemporaneous, memorandum, setting forth the views of the trial court, is handed down.

Section 11 of the Workmen's Compensation Law (Consol. Laws c. 67) provides that:

"The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employe, * * * to recover damages, at common law or otherwise on account of such injury."

Ever since the enactment of the Workmen's Compensation Law this provision has been supposed by everybody—lawyers, judges and laymen—to be a complete protection to the employer against common-law actions. The Appellate Division in this department has twice so held. Kenny v. Union Railway Co., 166 App Div. 497, 152 N. Y. Supp. 117; Ide v. Faul & Timmins, 179 App. Div. 567, 166 N. Y. Supp. 858. The plaintiff, however, insists that Wolff v. Fulton Bag & Cotton Mills, 185 App. Div. 436, 173 N. Y. Supp. 75, upsets this rule and opens the door to common-law actions in certain instances.

I utterly disagree with the reasoning of that case. It undertakes to establish the doctrine that the relation of employer and employe, within the meaning of the law, does not exist unless the employment is a "legal" employment. This is not a liberal interpretation of the enactment; it is a strained and far-fetched view. It violates the spirit of the act, I believe, and reads into the statute a provision never intended by the Legislature. The Workmen's Compensation Law was revolutionary in character. It swept away all common-law actions. It established a new tribunal for the recovery of damages arising out of injuries to employes; a tribunal summary in character; a tribunal to do rough justice. It made no fine distinctions between "legal" and illegal employment. It was all-comprehensive and sweeping in character It included all classes of employes—illiterate, infant, alien, adult. Any construction which narrows its scope does violence to the plain intent of the statute.

But I should not be presumptuous enough to set up my judgment against that of the Second Department were I forced to stand alone

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in my position. The Appellate Division of my own department has taken this position from the start. While I was yet on that bench the Kenny Case was decided. There Judge Lyon said:

"While the relation of employer and employe as defined by the statute must have existed at the time deceased sustained the injury, it matters not whether the employment was under a contract concededly valid as to both parties, or under a contract voidable at the election of the employer, or whether the liability of the employer for wages was fixed, or determinable under quantum meruit. The vital question is whether the relation of employer and employe existed between the deceased and the railway company, and the facts being conceded, the question is one of law."

I concurred in that decision then; I concur in it now.

Again in the Ide Case Judge Lyon wrote:

"Clearly the fact that the claimant was employed in violation of this provision of the Labor Law furnishes no defense to the payment of compensation to either the employer or insurance carrier."

Nothing could be more explicit than this.

It is quite true that the opinion in the Wolff Case is much more pretentious, and is directed more pointedly at the question under consideration here; nevertheless, as I view the two cases cited, this department has twice decided this question, and these decisions are binding upon me.

Moreover, I believe the Third Department to be the better authority. The justices of this court were the pioneers of the Compensation Law in this state They have wrestled with all its intricate provisions from the beginning. They have studied it from every angle. They have weighed and measured and balanced every section and sentence. Therefore, if I have properly comprehended the decisions in this department, one isolated case in another department, holding a contrary view, ought not, of course, to control my determination.

These were the considerations which moved me to grant the motion.

Motion granted.

INDUSTRIAL COMMISSION v. DAVIDSON. (No. 16222.)

(Supreme Court of Ohio. Feb. 17, 1920.)

126 Northeastern Reporter 876

(Syllabus by Editorial Staff.)

MASTER AND SERVANT—APPEAL NOT REMEDY FOR INDUSTRIAL COMMISSION'S REFUSAL TO EXERCISE CONTINUING JURISDICTION TO DETERMINE RIGHT TO FURTHER COMPENSATION.

An award for temporary disability, made and certified by the court of common pleas on appeal under Workmen's Compensation Act, § 43, from a decision of the Industrial Cmmission refusing compensation, should be treated as if rendered by the commission for the purpose of exercising its continuing jurisdiction under section 39 to determine claimant's right to further compensation, but for failure to exercise such jurisdiction the remedy is not by appeal, in the absence of statute giving it.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Error to Court of Appeals, Richland County.

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Proceedings by Blanche Davidson to recover for injuries under the Workmen's Compensation Act. An award of compensation was refused by the IndustrialCommission, and in the common pleas court plaintiff had judgment, which was affirmed by the Court of Appeals, and the Industrial Commission brings error. Reversed and rendered.

John G. Price, Atty. Gen., B. W. Gearheart and R. R. Zurmehly, Sp. Counsel, both of Columbus, and T. R. Robison, Pros. Atty., of Mansfield, for plaintiff in error.

Wm. McE. Weldon, of Mansfield, for defendant in error.

PER CURIAM. At the January, 1915, term of the court of common pleas of Richland county, Blanche Davidson recovered a judgment in an action wherein she had appealed from the decision of the Industrial Commission, refusing to allow her any compensation for injuries which she claimed to have sustained in the course of her employment as an employe of a company which was a contributor to the state insurance fund. In that action she was awarded compensation for a period of 55 weeks, at the rate of $4.50 per week, from February 3, 1914, to March 1, 1915, the date of the rendition of the verdict. The jury at the same time returned special findings, in substance that the plaintiff was suffering from the injuries alleged in the petition, which were received by her in the course of her employment; that such injuries were temporary, and occasioned partial disability; and that plaintiff had been temporarily and partially disabled for 55 weeks. Judgment was awarded, and that judgment, which included allowance for medical services and attorney fees, was paid.

Thereafter she made application to the Industrial Commission to continue to pay her compensation for her disability, beginning with March 1, 1915, claiming that she had ever since the 1st day of March, 1915, continued to suffer from such injuries, which she had sustained on January 26, 1914. Such application was rejected by the Industrial Commission on the ground that her claim had been fully adjudicated in the former proceeding. Thereupon the plaintiff again appealed to the common pleas court of Richland county. Upon trial in the common pleas court she was awarded a judgment in the sum of $3 per week for a period of 100 weeks, which judgment was affirmed by the Court of Appeals.

The question presented by the record is whether the second appeal from the action of the Industrial Commission was authorized, and therefore whether the court of common pleas had any jurisdiction of the cause upon such second appeal. The provision of the statute respecting the right of appeal from the action of the Industrial Commission in such matters is found in section 1465—90, General Code, which, as it then existed, provides in substance that the board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final: Provided, however, in case the final action of the board denies the right of claimant to participate at all in such fund on the ground that the injury was self-inflicted, or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, the claimant may appeal to the court of common pleas and be entitled to a trial in the ordinary way.

It was under this provision that the first appeal was taken and an award made in the common pleas court. The right of the claimant to participate in the insurance fund, having been established in that proceeding, and that award having been certified to the Industrial Commission, the claim should have been thereafter treated in all respects as if the award had been rendered by such commission. Roma v. Industrial Commission, 97 Ohio St. 247, 119 N. E. 461. Under the pro-

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visions of section 1465—86, General Code, the Industrial Commission then had continuing jurisdiction of such matter, just the same as if the award had been made the claimant by the Industrial Commission instead of by the court upon appeal, and it was the duty of the Industrial Commission thereafter to consider and determine whether the physical condition of the claimant resulting from injuries sustained by her was such as to entitle her to continued payment of installments from the insurance fund.

It is apparent that the Industrial Commission misconceived its duty in the premises, and not only refused payment, but refused to consider the question of whether the claimant was entitled to any further payment, upon the ground that the entire matter had been adjudicated in a former proceeding in the common pleas court, and the Industrial Commission had no further jurisdiction in the matter. Under the statute it was the clear duty of the commission, under its continuing jurisdiction as provided in section 1465—86, General Code, to inquire and ascertain whether the claimant was entitled to further compensation. The statute at that time made no provision whatever for appeal from the action of the commission denying the right to continue to participate in said fund, and in the absence of such provision the right of appeal does not exist. For failure of the Industrial Commission to recognize and exercise its jurisdiction and consider the merits of the plaintiff's application for further compensation, the remedy was therefore not by way of appeal.

Judgment reversed, and judgment for plainiff in error.

Nichols, C. J., and Jones, Matthias, Johnson, and Robinson, JJ., concur.

Merrell, J., not participating.

FERRI v. LENNI QUARRY CO. et al.

(Supreme Court of Pennsylvania. Feb. 2, 1920.)

109 Atlantic Reporter 845.

MASTER AND SERVANT—REFEREE'S FINDING, APPROVED BY COMPENSATION BOARD, CONCLUSIVE ON REVIEW.

In a compensation proceeding, a finding of the referee, aproved by the compensation board, that the claimant's husband, while in defendant's employment, received injuries by accident which caused his death, is conclusive.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Court of Common Pleas, Philadelphia County.

Proceedings by Vienna Ferri, for compensation for the death of her husband, opposed by the Lenni Quarry Co., employer, and the Fidelity & Casualty Company of New York, insurance carrier. From a judgment for the claimant, defendant insurance carrier appeals. Appeal dismissed, and award affirmed.

The following is the finding of the referee as to the third fact:

(3) That on August 2, 1918, while in the course of his employment with the defendant, the said decedent, Joseph Ferri, received injuries by accident which caused his death the following day, on August 3, 1918. That the defendant had immediate notice of the accident which caused said decedent's death.

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Argued before Brown, C. J., and Moschzisker, Frazer, Walling, Simpson, and Kephart, JJ.

William G. Wright, of Philadelphia, for appellant.
Walter Linton, of Philadelphia, for appellee.

PER CURIAM. The third fact found by the referee, and approved by the Compensation Board, was that, on August 2, 1918, while in the course of his employment with the defendant, the husband of the claimant received injuries by accident which caused his death the following day. This is conclusive. Gallagher v. Walton Manufacturing Co., 264 Pa. 29, 107 Atl. 327.

Appeal dismissed, and award affirmed.

QUALP v. JAMES STEWART CO., Inc., et al.

(Supreme Court of Pennsylvania. March 8, 1920.)

109 Atlantic Reporter 780.

1. MASTER AND SERVANT—COMPENSATION LAW CONSTRUED ACCORDING TO CLEAR INTENDMENT.

In determining liability under the Workmen's Compensation Law the court must be guided by the clear intendment of the act as expressed by the words and definitions there used.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

3. MASTER AND SERVANT—ORIGINAL CONTRACTOR HELD "EMPLOYER," SUBCONTRACTOR "CONTRACTOR," AND DECEASED A "LABORER HIRED BY CONTRACTOR" WITHIN COMPENSATION LAW.

Where original contractor contracted for performance of contract by subcontractor, and where such subcontractor contracted for performance of same work with a second subcontractor, the original contractor was liable for compensation for the death of a laborer hired by second contractor, though he had no knowledge that such subcontractor was performing the work, he being an "employer" and the second subcontractor being a "contractor" and the deceased being a "laborer hired by contractor" under Workmen's Compensation Law, art. 3, § 302b, making an "employer" who permits the entry upon premises occupied by him or under his control of a laborer hired by an "employee" or contractor for the performance upon such premises of a part of the employer's regular business intrusted to that employee or contractor liable for compensation to such laborer, in view of section 302 and article 2, § 203, and art. 1, §105.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Contractor; Employer.)

4. MASTER AND SERVANT—ORIGINAL CONTRACTOR NOT LIABLE FOR COMPENSATION FOR DEATH OF EMPLOYEE OF OTHER "INDEPENDENT CONTRACTOR."

One contractor is not liable for compensation for death of an employee of another contractor working on the same premises in furtherance

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of owner's general plan, but performing under another and different contract with the owner; such other contractor being, under the Workmen's Compensation Law, an independent contractor to whom his employees must look for compensation.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.)

Appeal from Court of Common Pleas, Philadelphia County.

Proceedings under Workmen's Compensation Law by Lucy Qualp for compensation for the death of her husband, opposed by the James Stewart Company, Incorporated, employer, and the Travelers' Insurance Company, insurer. Award for claimant affirmed by Court of Common Pleas, and employer and insurer appeal. Affirmed.

Argued before Brown, C. J., and Moschzisker, Frazer, Walling, Simpson and Kephart, JJ.

Benjamin O. Frick, of Philadelphia, for appellant.
Arthur T. Porteous, of Philadelphia, for appellee.

KEPHART, J. Do the facts as found by the referee under the law sustain the allowance of the award? is the only question raised by this appeal.

James Stewart Company, Incorporated, made a contract with one Nibbs to perform the work covered by his contract with the owner, according to plans and specifications furnished by the Stewart Company. Nibbs in turn made an agreement with Wolfarth & Greenfield to perform the same work according to the same plans and specifications. A laborer employed by Wolfarth & Greenfield died from an injury received during the course of his employment. His widow claimed and was allowed compensation from the Stewart Company, the original contractor, which the compensation board and the court below refused to disturb. The Stewart Company and its insurer appeal. The referee found, in addition to the foregoing facts, that the work performed upon the premises was a part of the regular business of the Stewart Company, and it had control over that part of the building where the work was being performed by the second contractor. This company had no control over the employes of Wolfarth & Greenfield, nor had Nibbs, the intermediate subcontractor. Both were interested in securing completion of the work in accordance with the plans and specifications. It does not appear the Stewart Company knew of the subcontract to Wolfarth & Greenfield.

Appellants resist the claim for the reasons: First, that it was not an employer under section 302b, (Act June 2, 1915 [P. L. 740]); second, Wolfarth & Greenfield was not a "contractor" and claimant's husband was not "a laborer hired by an employe or contractor" under the foregoing section; third, to hold otherwise would render section 302b unconstitutional.

[1, 2] In determining liability under the Workmen's Compensation Law, we must be guided by the clear intendment of the act as expressed by the words and definitions there used; if prior judicial decisions tend to limit or curtail the effect of words and phrases that are used with a certain meaning defined by the act, the legal rule announced by such decisions must give way to what the lawmaking body prescribed the use and meaning of the words to be. Such action within the legislative authority must control. Section 302b of article 3 reads:

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"After December 31, 1915, an employer who permits the entry, upon premises occupied by him or under his control, of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business intrusted to that employe or contractor, shall be conclusively presumed to have agreed to pay to such laborer or assistant compensation in accordance with the provisions of article three."

[3, 4] The Stewart Company, as original contractor in control of the premises to perform the work it had engaged to do, is regarded by the Workmen's Compensation Law as the employer to those engaged on or about work within the scope of the undertaking. It was the first, so far as claimant is concerned, to assume charge of the premises and to agree to do the work looking to at least a partial completion of the structure or enterprise as contemplated by the owner. This relation of employer to those employed about the premises includes only those whose work is a part of that embraced within the terms of the employer's contract with the owner. The work of a contractor, on the same premises, in furtherance of the owner's general plan, on the same structure or enterprise, performing under another and different contract with the owner, is, as to the person under consideration, the work of an independent contractor under the law, and his employes or those under him must look to him for compensation. Each is separate and distinct, operating within his own sphere, though engaged on the same general work.

The claimant, a laborer on the premises under the employer's control, was engaged by a contractor to do a part of the work undertaken by the original contractor. This work was a part of the employer's regular business, made so by his contract with the owner.

The work so performed by the laborer was intrusted by the original contractor to a contractor ordinarily known as a subcontractor, who, by the terms of the act, is included in the designation "contractor." He is a subcontractor because his contract is subordinate to and under the principal contract, though in the business world he may be independent; but as regards this transaction his contract is a dependent one, wherein he agrees to do all or a part of that which another has agreed to do. This subcontractor in turn "intrusted" the same work to another "contractor" (a second subcontractor) who employed claimant. The essential consideration is that the work of the original contractor, to be performed under his contract, was intrusted to a contractor (a subcontractor being under this designation) to be carried out as part of the original contractor's regular business. The act did not intend to limit the "hiring a laborer" to a "contractor" standing in immediate contractual relation with the employer (original contractor); it intended to include these laborers or employes who did work in furtherance of the employer's business, who were employed by any one having a lawful right or duty to engage in the business undertaken by the employer. The section of the act reads, in substance, an employer who permits, upon premises under his control, a laborer hired by a contractor for the performance of a part of the employer's regular business intrusted to that contractor. Certainly a stranger, without lawful authority from or through the employer (original contractor), could not force himself into a position where the employer would be held for compensation liability to his (the stranger's) employes. He must be intrusted with the work by one who had the right to so intrust him, and this right has been so broadened by the terms of the act as to exclude some of the ordinary rules of master and servant, principal and agent, contractor and contractee, as applied and understood at common law.

The power was placed in the employer's subcontractor to make a further subcontract, and thus further intrusted the performance, on the premises, of a part of the employer's regular business that had been intrusted by the employer to that subcontractor. The employer, through

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his failure to take advantage of the exemption allowed by the act, made it possible to create the condition which actually followed. Unless the precaution provided by law was taken, employes of the second subcontractor would stand in the same relation to the original contractor as employes of the first subcontractor. The employer could have prevented this by posting notices or by providing for compensation liability in his subcontract, in the event of a secondary subcontract. Without the employer's knowledge and because of his failure to protect himself, a second contract was made which, by the clear intendment of the act, brought the employes of the second subcontractor under or within the compensation liability of the original contractor. The reason for the rule is plain. The Legislature wanted to definitely fix some responsible party with the obligation of paying compensation to injured workmen, and the party selected was the first whose duty it was to assume control of the work. It selected the first in succession from the owner, believing the owner would contract with none but responsible persons. He was the first in the field and in the contracting scheme of work, the head of the endeavor, the person to whom an employe would naturally look. This liability may be avoided, but it must be done in the way pointed out by the act, and of this the employe must have notice. No unfair dealing can thus arise. The act intended to throw the burden on the man who secured the original contract from the owner to the end that employes of any degree doing work thereunder might always be protected in compensation claims.

Section 105, P. L. 737, provides that the term "contractor" as used in article 2, section 203, and article 3, section 302, shall not include a contractor engaged in an independent business, other than that of supplying laborers or assistants, in which he serves persons not the employer in whose service the accident occurs, but shall include a subcontractor to whom a principal contractor has sublet any part of the work which such principal contractor has undertaken. This, in connection with 302b, quoted and discussed, and the latter clause of section 302b, which reads, "It shall not be in effect between the intermediate employer or contractor and such laborer or assistant, unless otherwise expressly agreed," indicates legislative intention to hold the original contractor for compensation liability to the employes of at least a secondary subcontractor.

[5, 6] We have repeatedly said that the title to an act need not be an index of its contents. If the title contains words which would lead the ordinarily inquiring mind to an investigation of their purport as set forth in the act, the title will be sufficient to embody such provisions as naturally relate to the language used. When the word "employer" was used in the title, and it further indicated he was to pay damages on a fixed schedule to his employes for injuries received in the course of employment, any one in the position of an employer would seek in the act information as to the extent of this liability. He would there find under certain conditions an original contractor was an employer to the employes of a subcontractor. The title gives notice of the purpose of the legislation by the simple form of the expression used, which is so broad and comprehensive as to include the various conditions dealt with in the act.

The judgment is affirmed.

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WHITTLE v. NATIONAL ANILINE & CHEMICAL CO.

(Supreme Court of Pennsylvania. Feb. 23, 1920.)

109 Atlantic Reporter, 847.

1. MASTER AND SERVANT—EXACT PRECISION IN FINDINGS OF COMPENSATION BOARD NOT REQUIRED.

Courts cannot look for the same precision in adjudications by the Workmen's Compensation Board as otherwise might be insisted on if the members were required to be learned in the law.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT — FINDING BY COMPENSATION BOARD THAT CANCER HAD BEEN HASTENED BY ACCIDENT WARRANTED.

A finding by the Workmen's Compensation Board that employee's death resulting from carcinoma had been hastened by an accident *held* warranted.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Court of Common Pleas, Philadelphia County.

Proceeding by Emma Whittle for compensation under the Workmen's Compensation Act (P. L. 1915, p. 736) for the death of her husband, the deceased employee, against the National Aniline & Chemical Company and the Fidelity & Casualty Company of New York, insurance carrier. From a decree dismissing exceptions to an award of the Workmen's Compensation Board, the employer appeals Affirmed.

Argued before Brown, C. J., and Moschzisker, Frazer, Walling, Simpson and Kephart, JJ.

William G. Wright, of Philadelphia, for appellant.
Augustus T. Ashton, of Philadelphia, for appellee.

FRAZER, J. Defendant the National Aniline & Chemical Company appeals from a decree dismissing exceptions to an award of the Workmen's Compensation Board in favor of the widow and child of a deceased employe of appellant company, made on the ground that death was the result of an injury occurring during the course of his employment which aggravated an existing disease and hastened death.

On November 12, 1917, a still in appellant's plant exploded, violently carrying deceased, who was nearest at the time, a distance of 30 feet. The only apparent physical injury suffered as a result of the explosion was a bruise on the left side of his face. This mark disappeared in a few days. There remained, however, a pain in his jaw first noticed the evening of the accident. The intensity of the pain continued to increase during the week, and upon examination the trouble was diagosed by two physicians as a malignant cancer termed carcinoma. On November 28 the affected parts were removed by an operation which gave temporary relief. A recurrence of the disease, however, a few months later resulted in the death of plaintiff's husband on May 21, 1918, more than six months after the happening of the accident. The claim for compensation was based on the theory: First, that the injury to decedent's face caused the carcinoma; and, second, that there had been a tumor on his face, which the injury changed to carcinoma. The medical testimony was conflicting, and the referee found as a fact that the first theory was not supported by the evidence, and that at the time of the

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accident deceased had been suffering from carcinoma of the cheek at or near the place of injury; that the natural development of the disease was gradual and slow, but, owing to aggravation caused by the accident, the growth was changed to a rapid development, finally resulting in death.

Appellant's counsel contends the record shows a total absence of legal evidence to sustain the finding of the referee that the accident aggravated the cancerous condition and caused death at an earlier period than would otherwise have occurred, and in support of this contention refers to the remark of the referee that the medical testimony "indicated that a local injury might cause an otherwise slow-growing cancer to light up and develop with great rapidity." The argument is this language indicates no evidence that the local injury aggravated the disease, and should be considered merely as evidence that it might do so, and consequently is insufficient proof that such result followed in this case, relying upon the principles laid down in Albert v. Transit Co., 252 Pa. 527, 97 Atl. 680, and Blasband v. Transit Co., 42 Pa. Super. Ct. 325. While a strict interpretation of the language used by the referee would justify the criticism made, if the purpose was to state the precise substance of the medical testimony as applied to this particular case, yet a careful reading of the paragraph in which the clause in question was used fails to convince us that the referee intended to do no more than make a general statement of probable cause and effect applicable to such cases in general, or had in mind that the medical testimony in this case went only so far as to say the injury might have been the cause of the rapid development of the cancer. This is especially true in view of the subsequent statement that the beginning of the rapid growth was coincident with the accident, and there was nothing otherwise to indicate any other cause for the sudden change in development from normal to abnormal, and the formal finding following to the effect that the aggravation of the disease was caused by the accident. The record shows at least four medical experts were called and examined, and, in absence of more definite proof, we cannot conclude the referee's final finding was not supported by testimony.

[1] It should be borne in mind that those charged with the responsibility of finding the facts in case of this class are not required to be learned in the law; consequently we cannot look for the same precision in their adjudications that otherwise might be insisted upon. Flucker v. Steel Co., 263 Pa. 113, 106 Atl. 192.

[2] The referee found from the testimony of the physicians that the natural course of carcinoma is gradual and slow, and that, though the evidence showed that before the accident decedent was suffering from this disease, its development had not reachad the stage to cause him inconvenience and was not noticeable. He further found the development after the accident was not such as would have been expected without an intervening cause which might be supplied by a local injury to the affected part. The further finding followed that, since the beginning of the rapid growth was coincident with the happening of the accident, and there was nothing in the evidence to indicate another cause, the conclusion was that death resulted from the accident. While the testimony of the physicians is not before us, it sufficiently appears in the findings that the referee did not act without proper evidence as the basis of his conclusion that decedent's premature death was caused by a pre-existing disease aggravated by the accident. The objection that absence of a finding that death was hastened by the accident is sufficiently answered by the tenth finding, that "this rapid development continued and progressed until it finally caused the decedent's death."

The judgment is affirmed.

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BLAIR v. MILLERS' INDEMNITY UNDERWRITERS. (No. 8342.)

(Court of Civil Appeals of Texas. Dallas. Feb. 28, 1920. Rehearing Denied April 17, 1920.)

220 Southwestern Reporter, 787.

1. MASTER AND SERVANT — INDUSTRIAL BOARD HAS INHERENT POWER TO CORRECT ERRORS IN ENTRY OF ITS AWARDS.

The Industrial Accident Board, though not expressly authorized to correct its awards except as provided in Vernon's Ann. Civ. St. Supp. 1918, art. 5246—25, permitting review for purpose of readjusting compensation, has inherent power to correct errors, inadvertences, and mistakes in the entry of its awards; but such authority must be exercised in harmony with provisions of the Workmen's Compensation Act, giving the courts jurisdiction to set aside awards.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—COMPENSATION CLAIMANT HAS ONLY STATUTORY REMEDY WHEN DISSATISFIED WITH AWARD.

Where the Industrial Board's award, though erroneously entered against one who was not a party, was one that claimant did not wish to consent to his only remedy was to give notice of dissatisfaction and bring suit under Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44, to set it aside.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

3. MASTER AND SERVANT—INDUSTRIAL BOARD MAY CORRECT CLERICAL ERROR IN AWARD AFTER TRANSFER OF CONTROVERSY TO COURT.

The transfer of the controversy to the court by bringing suit under Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44, to set aside an award of compensation does not affect the Industrial Board's right to correct clerical errors either of omission or commission when such errors are manifest from the record of the proceedings, in the same manner that judicial tribunals correct their judgments by appropriate nunc pro tunc orders.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

4. MASTER AND SERVANT — NOTICE OF REJECTION OF AWARD ERRONEOUSLY ENTERED SUFFICIENT NOTWITHSTANDING SUBSEQUENT CORRECTION OF ERROR.

Where compensation claimant gave notice of refusal to accept award and brought suit under Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44, to set it aside, the notice was sufficient for the purpose of suit, though the Industrial Board thereafter changed the award so as to make it run against the insurer who was a party to the proceeding, instead of against a stranger, since the subsequent entry was merely to correct an error of commission and related back and became effective as of date on which the original award was entered.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

Appeal from Dallas County Court; W. F. Thornton, Judge.

Suit by Will Blair against the Millers' Indemnity Underwriters. Judgment of dismissal, and plaintiff appeals. Reversed and remanded, with directions.

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John White and M. M. Parks, both of Dallas, for appellant.
Harry P. Lawther, of Dallas, for appellee.

RASBURY, J. This is an appeal from the judgment of the court below sustaining appellee's plea in bar challenging appellant's right, as plaintiff below, to maintain the suit.

The facts disclosed by appellant's petition, and found by the court and necessary to a determination of the issues presented on appeal, are briefly these: Appellant, an employe of Planters' Cotton Oil Company, while in the performance of his duties as laborer, received serious injuries to the second finger of his right hand. At the time of the injury, appellant's employer was a subscriber to the insurance association created by the act commonly known as the Workmen's Compensation Law, and held a policy of insurance issued by Millers' Indemnity Underwriters, indemnifying it against damages for personal injuries to its employes under the provisions and regulations of that law. Within the time required by the act, appellant gave notice of his injury to his employer and the Millers' Indemnity Underwriters and filed claim with the Industrial Accident Board, also created by said act, for 43 weeks' disability, amounting to $483.75. On November 21, 1918, after a hearing upon the pleading and evidence of appellant, the Millers' Indemnity Underwriters and the Planters' Cotton Oil Company, the board rendered an award in favor of appellant against the Ocean Accident & Guaranty Corporation, Limited, notwithstanding the only parties to the proceeding were appellant, Millers' Indemnity Underwriters, and Planters' Cotton Oil Company. Within the time required by the act and on November 23, 1918, appellant gave written notice to the board, the Millers' Indemnity Underwriters, and the Planters' Cotton Oil Company that he would not accept the award of the board, and on November 26, 1918, filed suit in the county court of Dallas county at law, to set aside the award, on the ground that it was contrary to law and the evidence adduced at the hearing. Pending such suit, and on December 4, 1918, the board amended or corrected the award of November 21, 1918, reciting among other matters that—

"After due notice to all parties at interest came on to (be) reviewed, on its own motion by the Industrial Accident Board, the order entered in this cause as of November 21, 1918, and it appearing to the board that error had been committed in said order, the said order is hereby set aside. * * *"

The board then proceeded to render the same award in favor of appellant as against the Millers' Indemnity Underwriters that it rendered against the Ocean Accident & Guaranty Corporation, Limited, by the former award. Appellant gave no notice to the board, the Miners' Indemnity Underwriters, or the Planters' Cotton Oil Company that he would not accept the award last rendered. Neither did he deny in his pleading or adduce testimony disproving the recitation in the last decree of the board that notice was given him of the correction of the original award.

The Workmen's Compensation Law provides, among various other matters, in substance, that employes whose claims are properly cognizable before the board constituted to hear and determine same are bound by the award made by the board, unless such employes shall, within 20 days after final decision of the board, give notice to the adverse party and the board that they do not consent thereto, and shall, within 20 days after such notice, bring suit in some court of competent jurisdiction in the county where the injury occurred to set aside the board's award; upon bringing of which suit the board shall proceed no further toward adjusting the claim. Article 5246—44, Vernon's 1918 Supp. Civ. & Crim. Stats. As we have shown by our statement of the facts, appellant did, after the first award, give the notice and file the suit, contemplated by the statute. Subsequently, however, and after notice to appellant and while said

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suit was pending, the board changed the award so as to make it run against the Millers' Indemnity Underwriters. The honorable trial judge was of opinion that it was necessary for appellee to give notice of his refusal to abide by the award after it was changed and to file suit to set aside. The evidence showing without dispute that the notice had not been given, the court, as a consequence, sustained the plea in bar and entered judgment final for appellee.

[1-4] The court's action in the respect stated is the issue of determination. The act contains scant provisions relating to procedure and does not in express terms confer upon the board authority even to correct or amend its awards, save in article 5246—25, Id., which permits a review, in case of changed conditions, mistake, or fraud, for the purpose of effecting a readjustment in the compensation allowed. We are persuaded, however, that the board possesses the inherent power to correct errors, inadvertences, or mistakes in the entry of its awards. That authority however, must obviously be exercised in harmony with those provisions of the act which give the courts of the state jurisdiction to set aside the awards of the board. By the provisions of the act, as we have shown, an employe who does not consent to the award of the board has 20 days within which to give notice of his refusal to accept the award, and 20 days thereafter within which to bring the suit. He may, of course, give the notice and bring the suit in as much less time as it may be accomplished. The facts here show that appellant had given the notice and brought the suit on November 26, 1918. By the express provisions of article 5246—44, supra, when the suit was brought the board was without authority to proceed any further toward adjustment of the claim. The provision is plain and not subject to construction. When the suit is brought, the controversy is automatically transferred to another tribunal. It marks the surrender by the board of further control in the matter in the same manner that the filing of an appeal bond, etc., marks the end of trial court's jurisdiction in the ordinary suits at law. The fact that the board erroneously or inadvertently entered judgment against one not before the court does not affect the fact that it lost control of the controversy in the ordinary sense. The award, even though erroneous, was one that appellant did not wish to consent to. His only remedy was to give the notice and bring the suit The act does not confer upon one not satisfied with the award the right even to request a new hearing, and as a consequence there is no duty to call the board's attention to manifest errors. Whatever is done, he can attack it only in the manner provided. Such provision of the act would not, however, in our opinion, affect the right of the board, even after the controversy has been transferred to the court of competent jurisdiction contemplated by the act, to correct clerical errors either of omission or commission, which such errors are manifest from the record of the proceedings, in the same manner that judicial tribunals correct their judgments by appropriate nunc pro tunc orders. So believing, we conclude that appellant was under no duty to give notice to the board or the insurer that he would not be bound by the award entered December 4, 1918.

In such connection, we are further of opinion that the award of December 4, 1918, was in effect the correction of an error of commission by the board and should be regarded as a nunc pro tunc order and have effect retroactively or as of November 21, 1918, the date of the original or first award. We believe the facts recited will justify that conclusion even in the absence of any affirmative declaration by the board that it was so intended. As we have recited, the pleadings and the court's findings show that appellant's claim was against the Millers' Indemnity Underwriters, alleged to have insured appellant's employer, Planters' Cotton Oil Company, a subscriber to the insurance association, against loss, according to the provisions of the Workmen's Com-

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pensation Law, on account of injuries to its employes. The only parties who appeared before the board and participated in the hearing were appellant, his employer, and the Millers' Indemnity Underwriters. The award, however, was against Ocean Accident & Guaranty Corporation, Limited. The order of December 4, 1918, recites that the first order was erroneous, and, while it does not recite the error, it obviously was clerical, since the precise difference in the two awards is that by the last entry the name of the company issuing the policy to the employer, the Miller's Indemnity Underwriters, was substituted for the name of one that none of the parties asserted was liable in any respect, and was not even a party to the proceeding. The result of the entry, whatever it may be designated, was to correct an error of commission, and was in effect to make appear of record on that date what the court had actually done on November 21, 1918. So believing, we hold that the giving of notice of refusal to consent to the last award was not necessary for the reason that the last entry related back and became effective as of November 21, 1918, and hence was effected by the first notice

For the reasons stated, the judgment will be reversed, and the cause remanded for another trial not inconsistent with the views herein expressed.

GEORGIA CASUALTY CO. v. WARD ET AL. (No. 2241.)

(Court of Civil Appeals of Texas. Texarkana. March 11, 1920. On Motion for Rehearing, April 22, 1920.)

220 Southwestern Reporter, 380.

On Motion for Rehearing.

1. MASTER AND SERVANT—ALLEGATION OF TIMELY CLAIM FOR COMPENSATION ESSENTIAL.

In an action for injuries to or death of employee, plaintiffs must allege that the claim for compensation was made within six months after the injury, or, in action for death, within six months after death, as required by Employers' Liability Act, § 4a (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246ppp).

(For other cases, see Master and Servant, Dec. Dig. § 401.)

2. MASTER AND SERVANT — SUIT HELD NOT "CLAIM FOR COMPENSATION" WITHIN EMPLOYERS' LIABILITY ACT.

The prosecution of a suit for an employee's death *held* not a "claim for compensation within Employers' Liability Act, § 4a (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246ppp), requiring that "claim for compensation" be made within six months after injury or death, or removal of physical or mental incapacity, as a condition precedent to proceeding for compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—INSURER HELD NOT TO HAVE WAIVED CLAIM FOR COMPENSATION UNDER EMPLOYERS' LIABILITY ACT.

Insurer's attorneys, by advising attorneys for plaintiffs, in action for compensation for employee's death, that the matter had been referred to them, that the attorneys for plaintiffs should have claim for compensation

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filled out, and that insurer was investigating plaintiffs' claim and would advise plaintiffs as to its decision as soon as investigation was completed, did not waive the making of a claim for compensation for the employee's death within six months thereafter, as required by Employers' Liability Act, § 4a (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246ppp).

(For other cases, see Master and Servant, Dec. Dig. § 398.)

4. MASTER AND SERVANT—PROCEEDINGS FOR COMPENSATION FOR DEATH TO BE INSTITUTED BEFORE INDUSTRIAL BOARD BEFORE SUIT.

An action for compensation for death of employee which occurred after the amendment of the Employers' Liability Act by Gen. Laws 1917, c. 103 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—1 et seq.), is not maintainable unless proceedings have been prosecuted to a decision in the first instance before the Industrial Accident Board.

(For other cases, see Master and Servant, Dec. Dig. § 394.)

Appeal from District Court, Hunt. County; A. P. Dononey, Judge.

Action by Jessie Ward and others against the Georgia Casualty Company and others. Judgment for certain of the plaintiffs, and the named defendant appeals. Reversed and dismissed.

In June, 1916, the Farmers' Cotton Oil Company, then operating a manufacturing plant at Wichita Falls, was a "subscriber" and appellant was "the association," within the meaning of the Employers' Liability Act, approved April 16, 1913. General Laws, c. 179 (Vernon's Sayles Ann. Civ. St. 1914, art. 5246h et seq.). On the 2d day of that month W. S. Ward, then an employee of said oil company, was injured in the course of his employment by being struck on the head by a wrench thrown by machinery in the oil company's plant. One Dea, said oil company's superintendent, was present at the time the accident occurred, and afterwards, but on the same day, caused a notice thereof to be sent to appellant and to the Industrial Accident Board created by said act. Ward did not present a claim for compensation as provided by the act until March 13, 1918. On that day he made such a claim on appellant, and at the same time forwarded a copy thereof to said board. There is nothing in the record showing action of any kind by the board on the claim. This suit was commenced by Ward April 2, 1918. He died April 15, 1918. By an amended petition filed April 17, 1918, his mother and his widow, for herself and as next friend for her minor child, became plaintiffs. They alleged that the injury Ward suffered June 2, 1916, as hereinbefore stated, was the cause of his death. The trial was to the court without a jury, and resulted in a judgment in favor of said widow and minor child against appellant for $1,330, and that the mother take nothing by the suit. The appeal was by the casualty company alone.

Frank S. Anderson, of Galveston, for appellant.
B. Q. Evans, of Greenville, for appellees.

WILLSON, C. J. (after stating the facts as above). Part of section 4a, pt. 2, of the Employers' Liability Act approved April 16, 1913 (General Laws, pp. 429 to 438 [Vernon's Sayles' Ann. Civ. St. 1914, art. 5246ppp]), was as follows:

"No proceedings for compensation for injury under this act, shall be maintained * * * unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employe, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity."

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It is insisted that making claim for compensation for an injury within the time specified in the part of the act just set out was a prerequisite to the existence in an employe of a right to an award thereunder; and that, because appellees did not specifically allege in their petition that claim for compensation for the injury to Ward was so made, the trial court erred when he overruled the demurrer to said petition on the ground that it did not appear from the allegations therein that appellees had a cause of action against appellant. It will be noted that by the terms of the act, "in case of the death of the employee" it was sufficient if the claim for compensation was made within six months thereafter. It was alleged in the amended petition filed by appellees April 17, 1918, that Ward died April 15, 1918. The filing of that petition was a claim by appellees for compensation provided for in the act, and, as it was filed within six months after Ward died, we see no reason why the trial court should have sustained the demurrer. Ackerson v. National Zinc Co., 96 Kan. 781, 153 Pac. 530. It is next insisted that if it sufficiently appeared from the allegations in the petition that appellees were entitled to compensation provided for in the act, the right to hear and determine the matter in the first instance was in the Industrial Accident Board alone, and that the court below therefore was without power to hear and determine it as he did. The argument is that by the terms of the act, properly construed, "no suit," quoting from appellants' brief—

can be brought upon a disputed claim until it has first been adjudicated by the Industrial Accident Board, and in the event the decision is not accepted suit may be brought upon the claim in the nature of an appeal from the findings of the board."

This court held to the contrary of the contention in the (to the writer) satisfactory opinions of Justice Levy in Fidelity & Casualty Co. v. House, 191 S. W. 155, and Roach v. Employers' Ins. Ass'n, 195 S. W. 328. As we view the matter, the conclusion reached in those cases was a sound one. Other objections to the judgment are set out in the assignments, but we think none of them presents a reason why it should be reversed. Therefore it is affirmed.

On Motion for Rehearing.

[1-3] The language of the part of section 4a of the act of April 16, 1913, set out in the opinion affirming the judgment, is emphatic that "no proceeding for compensation" under it should be maintained unless claim for the compensation was made as it provided; that is, within six months after the employe suffered the injury, or, in case of his death, within six months thereafter. Similar provisions in like statutes in other jurisdictions have been construed to be mandatory and a compliance with requirements thereof to me indispensable to the existence of a right to maintain proceedings to compel the payment of compensation provided for therein. Haiselden v. Industrial Board, 275 Ill. 114, 113 N. E. 877; Bushell v. Industrial Board, 276 Ill. 262, 114 N. E. 496; Monstgaard v. Industrial Commission, 287 Ill. 156, 122 N. E 49; Central Locomotive & Car Works v. Industrial Commission, 290 Ill. 436, 125 N. E. 369; In re Levangie, 228, Mass. 213, 117 N. E. 200; Kalucki v. American Car & Foundry Co., 200 Mich. 604, 166 N. W. 1011; Brown v. Weston-Mott Co., 202 Mich. 592, 168 N. W. 437; Rubin v. Fisher Body Corporation, 205 Mich. 605, 172 N. W. 534; Smith v. Solvay Process Co., 100 Kan. 400, 163 Pac. 645. It does not appear from either appellees' pleadings or the testimony that Ward within six months after he suffered the injury made a claim for compensation therefor, nor that appellees within six months after his death made such a claim, unless their prosecution after Ward's death of the suit commenced by him in his lifetime was such a claim within the meaning of the statute. On further consideration of the matter we have concluded that the prosecution of that suit by appellees was not such a claim, and therefore that we erred when we held to the

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contrary and overruled the assignments in appellant's brief attacking the judgment as unauthorized by either the pleadings or the testimony. We do not think there is merit in appellees' insistence that it appeared that appellant had waived its right, if it ever had any, to urge the failure to present a claim for compensation as a reason why appellees should not be allowed to maintain the suit. The insistence seems to be based on letters written by agents of appellant to appellees attorneys March 20, 1918, and April 3, 1918. In the first of the two letters said agents merely advised said attorneys that their letter of March 13 to appellant had been referred to them, and requested said attorneys if they were—

"representing Mr. Ward for compensation to have a claim for compensation blank filled out and return to us, together with your advices as to what amount of compensation Mr. Ward is claiming, and the period of disability for which he is claiming compensation."

And the other merely advised said attorneys that said agents were—

"making investigation of the claim, and will advise you position of the company as to payment just as soon as investigation is completed."

It cannot with reason be contended that the letters, assuming the existence in the agents who wrote them of authority to bind appellant, constituted an agreement to waive the failure to present a claim for compensation within the time fixed by the statute, and it does not appear from anything we have found in the record that appellees because of the letters did anything they would not have done or failed to do anything they would have done had they never been written. 40 Cyc. 252 et seq.; 4 R. C. L. 799; Adams v. Crittenden, 191 S. W. 835.

[4] It follows from what has been said that we are of the opinion the suit, so far as it was a continuation of the one commenced by Ward and in his right, could not be maintained, because of his failure to make a claim for compensation for the injury within six months after he suffered it. And, we add, so far as it was for compensation for Ward's death, which occurred after the act of March 28, 1917 (General Laws, c. 103 [Vernon's Ann. Civ. St. Supp. 1918, art. 5246—1 et. seq.]), amending the act of April 16, 1913, took effect, it could not be maintained, because by the terms of the statute as amended proceedings for the compensation must have been commenced and prosecuted to a decision in the first instance before the Industrial Accident Board.

The motion for a rehearing will be granted, the judgment heretofore rendered here will be set aside, the judgment of the court below will be reversed, and, it appearing from the record conclusively, we think, that Ward did not within the time fixed by the statute present a claim for compensation for the injury he suffered, judgment will be rendered here dismissing the suit, but without prejudice to the right of appellees to prosecute before the Industrial Board a claim for compensation for the death of said Ward.

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AMALGAMATED SUGAR CO. ET AL. v. INDUSTRIAL COMMISSION OF UTAH ET AL. (No. 3457.)

(Supreme Court of Utah. April 2, 1920.)

189 Pacific Reporter, 69

1. MASTER AND SERVANT—FINDING OF INDUSTRIAL COMMISSION UNDER COMPENSATION ACT BINDING ON REVIEWING COURT.

Finding of the Industrial Commission making an award under the Workmen's Compensation Act must be sustained by the courts where supported by substantial evidence. *

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT — AWARD OF COMPENSATION FOR DEATH FROM INJURIES IN EMPLOYMENT HELD SUPPORTED BY EVIDENCE.

Award by the Industrial Commission in favor of the widow of deceased servant made on the theory that the servant died as a result of carbon monoxide poison incurred during his employment *held* supported by substantial evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Original proceedings by the Amalgamated Sugar Company, employer, and the Continental Casualty Company, insurer, to review an award of the Industrial Commission of Utah awarding compensation under the Workmen's Compensation Act in favor of Annie C. Benson. Award affirmed.

George H. Smith and R. B. Porter, both of Salt Lake City, for plaintiff.

Dan E. Shields, Atty. Gen., and Jas. H. Wolfe, O. C. Dalby, and H. Van Dam, Jr., Asst. Atty. Gen., for defendant.

CORFMAN, C. J. This matter was brought on for review before this court under the provisions of Comp. Laws Utah 1917, § 3148, as amended by chapter 63, Laws Utah 1919 (section 3148a, p. 164), upon the application of plaintiffs for a writ of certiorari wherein it was alleged that the Industrial Commission of Utah had exceeded its jurisdiction by rendering a decision and in making an award to Annie C. Benson for the use and benefit of herself and her minor children. Such writ was issued by this court February 25, 1920. In compliance with the writ the Industrial Commission (hereinafter referred to as Commission) certified to this court a record of its proceedings, including the evidence taken before it in the case.

It appears that Alma Peter Benson died December 14, 1918, while in the employ of the Amalgamated Sugar Company at Smithfield, Utah. On September 10, 1919, Annie C. Peterson, his widow, for and in behalf of herself and as the guardian of the minor children of said Alma Peter Benson and as administratrix of the estate of said decedent, filed with the Commission a claim for compensation, alleging that the death of decedent had been caused by an accident arising out of and in the course of his said employment with said Amalgamated Sugar Company, a corporation. Thereafter a hearing was had upon said application before B. D. Nebeker, as referee for the commission, and evidence taken

* Industrial Commission v. Evans, 174 Pac. 825; Murray City v. Industrial Commission 183 Pac. 331.

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and received in behalf of the respective parties, claimants, and the said Amalgamated Sugar Company, and a return and report made by said referee that the death of the said Benson had not been caused by reason of an accident arising out of and in the course of his employment with the said Amalgamated Sugar Company. The majority of the members of the Commission refused to adopt the report and finding of the said referee, and thereafter, December 6, 1919, the said Commission, through its said majority members, rendered a decision and made an order awarding the said claimants the compensation now complained of by the petitioners herein.

The only question raised and presented to this court for consideration is whether or not there is any substantial testimony in the record which tends to support the finding of the Commission that the death of the said Benson was occasioned by accidental causes arising out of and in the course of his employment with the Amalgamated Sugar Company.

The testimony shows that the decedent, Benson, was, at the time of the alleged accident, a common laborer, 58 years of age, residing with his family at Newton, Utah, about six miles distant from the sugar factory of petitioner Amalgamated Sugar Company. In the evening of December 13, 1918, he walked from his home to the sugar factory, where he was employed, and went to work at 9:30 p. m. wheeling lime with a wheelbarrow from a limeroom out of a large kiln, cylindrical in form, which extended from the floor to the ceiling in said room. Near the top the kiln was provided with an iron pipe for carrying off the gases generated in the burning of the lime rock with coke. At the bottom of the kiln was an opening for shoveling out the lime when burnt. The testimony shows that carbon monoxide gas was generated by the burning process, and a pump was operated for the purpose of drawing off from the burning lime the gases thus generated. If the pump stopped or the kiln fires became low, gases escaped into the room. According to the testimony, when these gases escaped into the kilnroom the lives of the employes were menaced, and it became necessary for them to vacate the kilnroom. Benson commenced his work at 9:30 o clock in the evening, and continued until about 1 o'clock the following morning, when he stopped to eat his lunch. When not engaged in wheeling lime from the kiln he sat in his wheelbarrow near the base of the kiln. About a half hour after eating his lunch, or at 1:30 o'clock a. m., he was taken violently ill and suffered greatly with pains in his chest and arms. His fellow employes then took him home, where he continued to suffer in the same way for four or five hours longer, when he died. Subsequently a post mortem examination was made by Drs. E. P. Oldham and H. K. Merrill, upon the result of which they expressed their opinion that the decedent had died from carbon monoxide poisoning contributed to by "coronary sclerosis," but that the immediate cause of death was carbon monoxide.

[1, 2] The theory of plaintiffs was that death was caused by acute bronchial pneumonia. In support of this theory Drs. Richard R. Ruper and Clarence Snow testified at great length. Conflicting testimony, therefore, was offered and received in support of the respective theories. The physical conditions, machinery, and appliances used in operating the plant were described in detail for the purpose of showing both the probability and the improbability of the gases escaping into the limeroom where the deceased had worked. The previous health and physical condition of the deceased were gone into and testified to by many witnesses. His appearance and symptoms attending the short illness were described. Blood tests and examinations of lung tissues were made by experts upon the result of which conflicting opinions were expressed by the medical experts who testified in the case. The medical experts widely differed in their opinions as to the cause of death. It would subserve no good purpose to review the testimony in detail which tends to support the conflicting theories of the respective parties. In this class of cases, under our statutes, this court is confined to a review of the testimony and

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findings of the Commission for the sole purpose of determining whether or not there is any substantial evidence in the record to support the award made by the Commission to the claimants. If there is any substantial evidence in the record to support the findings of the Commission, and the ultimate facts found by the Commission support the award, we, as a reviewing court, under our statutes, cannot do otherwise than enter judgment affirming the award made by the Commission. Industrial Com. v. Evans, 174 Pac. 825; Murray City v. Industrial Com., 183 Pac. 331.

By a majority of the members of the Commission in this case it was found:

"It appears that in general the decedent up to the time of his death had had good health; that some six weeks prior thereto he had had a light case of 'flu' which had kept him at home for about ten days, but which had not kept him in bed; that prior to about 1:30 a. m. on the morning of the 14th he had made no complaint and manifested no signs of illness; that he worked that night in the limeroom, where lime dust was present and where gases were generated, and that a pump was kept in constant operation to take the gases out of the room; that at least two other employes had at previous times been affected by gas while working in the limeroom. An autopsy was performed by two doctors, who testified that the cause of death was carbon monoxide poisoning. * * * The facts, or rather the conclusions drawn from the facts by the medical experts, are vigorously disputed by the defendants [petitioners here]. Two doctors produced by the defendants testified that the facts developed at the autopsy showed that the death could not have been due to carbon monoxide poisoning, but that it was due to dilatation of the heart caused by an acute attack of bronchial pneumonia. * * * The majority of the Commission, after a most careful consideration of this case, arrived at the conclusion that the truth is that * * * the immediate cause of death was carbon monoxide poisoning."

We find there is substantial evidence to support the findings and award made by the Commission. It is therefore ordered that the award made herein by the Industrial Commission of Utah be, and the same is hereby, affirmed; costs to be taxed against plaintiffs.

Frick, Weber, Gideon, and Thurman, JJ., concur.

INDUSTRIAL COMMISSION ET AL. v. AGEE, DISTRICT JUDGE.
(No. 3446.)

(Supreme Court of Utah. April 9, 1920.)

189 Pacific Reporter, 414.

2. MASTER AND SERVANT—PENDING CASES NOT AFFECTED BY AMENDMENT TO COMPENSATION ACT.

In view of Comp. Laws 1917, §§ 5839, 5840, 5842, amendment of Industrial Commission Act (Comp. Laws 1917, § 3148), by Laws 1919, c. 63, § 3148a, to provide for review of decisions of commission on certiorari or review in Supreme Court in first instance instead of district court, *held* not to have affected cases pending and being prosecuted prior to time amendment became effective.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

Petition for writ of prohibition by the Industrial Commission of Utah, A. M. Miller, and the Ætna Life Insurance Company against Hon.

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Alfred W. Agee, Judge of the District Court of Weber County, State of Utah. Permanent writ denied, alternative writ previously issued set aside.

De Vine, Stine & Gwilliams and J. D. Murphy, all of Ogden, for plaintiffs.

Chez & Parker, of Ogden, for defendant.

CORFMAN, C. J. Plaintiffs petitioned this court for a writ of prohibition, forbidding the defendant, Hon. Alfred W. Agee, as judge of the district court of Weber county, from proceeding to exercise jurisdiction and to determine upon the merits, under the provisions of chapter 100, Laws 1917, § 87 (section 3148, Comp. Laws Utah 1917), as amended by chapter 63, Laws Utah 1919 (section 3148a, p. 164), an appeal to said district court taken from a decision rendered by the Industrial Commission of Utah in a certain matter wherein Emma Chandler was applicant and A. M. Miller et al. were defendants. An alternative writ was issued. The defendant has answered.

It appears that on June 29, 1918, Mrs. Emma Chandler, the surviving widow of George C. Chandler, deceased, filed with the Industrial Commission of Utah, under the provision of chapter 100, Laws Utah 1917, an application for compensation on account of the death of her husband while an employe of the petitioner herein, A. M. Miller; that on August 16, 1918, the Industrial Commission rendered its decision, denying compensation; that August 31, 1918, said applicant appealed from the decision denying her compensation to the district court for Weber county, in accordance with the provisions of Comp. Laws Utah 1917, § 3148; that September 13, 1918, applicant filed her complaint in said district court; that January 13, 1919, applicant filed an amended complaint in said cause, wherein the petitioners here, A. M. Miller and the Ætna Life Insurance Company, were made additional parties defendant on said appeal; that January 27, 1919, the said defendants filed a general demurrer to the amended complaint; that April 25, 1919, the said district court ruled that the amended complaint changed the issues in said cause, and therefore referred the case back to the Industrial Commission, as provided by statute, for further proceedings under the original application; that May 6, 1919, the Industrial Commission rendered its second decision and again denied compensation to the applicant, and remanded and recertified its proceedings to said district court; that June 30, 1919, the district court set the general demurrer of the defendants for hearing; that July 7, 1919, said demurrer was sustained, and an order made by said district court, dismissing the action on the merits; that thereupon applicant appealed to this court from the order of the district court sustaining the demurrer and dismissing the action on the merits; that November 7, 1919, this court reversed the judgment of the district court dismissing the action, and remanded the case to the district court, with directions to overrule defendants' demurrer and proceed with the case (Chandler v. Industrial Commission of Utah et al., 184 Pac. 1020); that thereupon said defendants asked for and were granted leave to file an amended demurrer, and also filed a motion for dismissal of the petition, both on the ground that the district court was without jurisdiction; that January 5, 1920, the district court ruled on the demurrer and petition, holding that it had jurisdiction to proceed and determine the appeal upon its merits whereupon the petitioners instituted the present proceedings before this court.

Comp. Laws Utah 1917, § 3148, under which the claimant Emma Chandler presented her claim to and was denied compensation by the Industrial Commission, and under the provisions of which she took an appeal to the district court, provides:

"The commission shall have full power and authority to hear and

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determine all questions within its jurisdiction, pertaining to the payment of compensation and benefits, and its decision thereon shall be final; provided, however, in case the final action of such commission denies the right of the claimant, * * * then the claimant, within thirty days after the notice of the final action of such commission, may, by filing his appeal in the district court in any county of the district where the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. * * * Within thirty days after filing his appeal, the appellant shall file a complaint in the ordinary form against such commission as defendant, and further pleadings shall be had in said cause, according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right of the claimant," etc.

In 1919 the Legislature amended in several particulars our Industrial Commission Act, including section 3148, supra, by passing section 3148a of chapter 63, Laws of Utah 1919, which provides, among other things:

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, within thirty days after the rendition of the decision on the rehearing any party affected thereby may apply to the Supreme Court of this state for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original award or the award on rehearing inquired into and determined.

"Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record, which shall include all the proceedings and the evidence taken in the case, to the court."

Subdivision (d) of the same section provides:

"No court of this state (except the Supreme Court) shall have jurisdiction to review, reverse, or annul any award of the commission or to suspend or delay the operation or execution thereof; provided, that a writ of mandamus shall lie from the Supreme Court in all proper cases."

It is very earnestly contended by the plaintiffs that the foregoing legislative enactment of 1919, which became effective July 1, 1919, repealed the law of 1917, and therefore the district court is without jurisdiction to proceed to determine the appeal taken to that court from the decision of the commission denying the claimant compensation. In support of their contention counsel have cited numerous cases and authorities to the effect that when statutes remedial in their nature are repealed by another which affords a new or different remedy, all actions pending, as well as all future actions brought, must be prosecuted under the provisions of the latter, unless there be some express saving clause in the new enactment to the contrary. Among the cases and authorities relied on by plaintiffs are the following: 25 R. C. L. pp. 791, 792; 7 R. C. L. p. 1031; 36 Cyc. pp. 1216, 1217; Texas Midland Ry. v. Southwestern T. & T. Co., 24 Tex. Civ. App. 198, 58 S. W. 152; Re Joseph T. H. Hall, 167 U. S 38—40, 17 Sup. Ct. 723, 42 L. Ed. 69; Larkin v. Saffarans (C. C.) 15 Fed. 147; Untermeyer v. Freund et al. (C. C.) 50 Fed. 77; Tennessee v. Snead, 96 U. S. 69, 24 L. Ed. 610; Clark v. Kansas City, St. L. & C. R. Co., 219 Mo. 524, 118 S. W. 40; Bidwell v. Sonoma Co. Trans. Co. (Cal. App.) 178 Pac. 723; Boucofski v. Jacobsen, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 898; Dillon v. Linder, 36 Wis. 344.

In opposition to the contention made by plaintiffs, the defendant contends that the 1919 amendment is prospective in its operation, was so intended by the Legislature, and must be so construed, as otherwise the claimant will have lost her right of appeal and be left remediless under the statute as amended; that the Constitution of the state of Utah guarantees every litigant the right of appeal within the time prescribed by

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law, six months; that to hold, under the circumstances, that the district court is without jurisdiction would in effect deprive the claimant of any legal remedy and nullify the express guaranty of our Constitution of the right of defendant to have her day in court.

It is further argued and contended by the defendant that, aside from taking into consideration the circumstances in which claimant would be left in holding that the district court is without jurisdiction by reason of the amendment of section 3148, the Legislature had in mind the provisions of section 5842, Comp. Laws Utah 1917, in force when it enacted the amended statute. Section 5842 provides:

"The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, and duty imposed, any penalty incurred, nor any action or proceeding commenced under or by virtue of the statute repealed."

This section is found in chapter 2 of Comp. Laws Utah 1917, entitled "Statutes—Construction," wherein it is further provided, by section 5839, that—

"The Revised Statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice."

It is further provided, by section 5840 of the same chapter, that—

"No part of the revised statutes is retroactive, unless expressly so declared."

In arriving at the legislative intent, the foregoing expressed rules of construction, we think, not only must be considered, but strictly adhered to, in passing upon the question of jurisdiction raised by the plaintiff.

The Industrial Commission Act of this state was originally passed, and became effective in 1917. Among other things, the purposes of its enactment were to establish "rates of compensation for personal injuries or deaths sustained by employes in the course of employment," and "providing methods of insuring the payment of compensation." It is obvious that it was not the intention of the Legislature to do away with or avoid these benign purposes in the slightest degree by the amendments made thereto in 1919, wherein it was provided that a writ of certiorari or review to the Supreme Court would lie in favor of the party affected by such decision, and that no other court "shall have jurisdiction to review, reverse, or annul any award of the commission."

[1] In seeking to arrive at legislative intent statutes should be construed in the light of existing circumstances. We have no doubt but that the legislative assembly of 1919 kept in mind the fact that cases were pending and being prosecuted under and in accordance with the provisions of the 1917 statute, and that the observance of section 5842 would protect such claimants without an express saving clause in the amended act of 1919.

Plaintiffs have cited us to the case of Boucofski v. Jacobsen, supra. It must be kept in mind that the Boucofski Case was one dealing with the subject of appeals and rules of procedure with respect thereto. That opinion, in so far as it has any bearing on the instant case, is to the effect that where by statute a new remedy is added to or substituted for an existing right it should be followed. The pertinent expressions of the opinion applicable to the present case, however, are in full accord, and clearly support the contention of the defendant. It was approvingly said:

"Every case must, to a considerable extent, depend on its own circumstances. General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice."

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[2] After giving all the cases cited by plaintiffs careful consideration we have become very strongly convinced that the contentions of the plaintiffs in the present case should not prevail. The rules of statutory construction contended for by plaintiffs have no application to the case and the attending circumstances, which we now have under consideration. No good reason has been or can be assigned for holding that it was the intention of the Legislature to amend the Industrial Commission Act of 1917 so as to leave claimants thereunder remediless in the prosecution of claims pending when the amendments of 1919 became effective. Rather, it was the legislative intent to continue the methods of insuring payment of compensation to claimants whose cases were pending, as provided for in the original act of 1917. In view of the expressed purposes of the act as originally passed and as amended, we can arrive at no other conclusion than that the legislative intent was that, in cases pending and being prosecuted prior to the amendments of 1919 becoming effective the rights of claimants should be determined as provided for in the original act of 1917; that future claimants should prosecute their claims under the provisions of the act as amended in 1919.

Indeed, in view of the provisions of section 5842, supra, and the other sections of our statutes we have referred to, no other rule of construction with respect to the legislative intent would be legally permissible.

It is therefore ordered that a permanent writ herein be denied, and that the alternative writ of prohibition heretofore issued be, and the same is hereby, vacated and set aside, with costs.

Frick, Weber, Gideon, and Thurman, JJ., concur.

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KNICKERBOCKER ICE CO. v. STEWART. (No. 543.)

(United States Supreme Court. Argued Dec. 16, 1919. Decided May 17, 1920.

40 Supreme Court Reporter 438.

1. ADMIRALTY — CONGRESS HAS EXCLUSIVE POWER OF LEGISLATION IN MARITIME MATTERS.

Under Const. art. 3, § 2, providing that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, and article 1, § 8, authorizing Congress to make necessary and proper laws for carrying out granted powers, the Constitution adopted and established as part of the laws of the United States approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction, and took from the states all power by legislation or judicial decision to cotravene the essential purposes or work material injury to characteristic features of such law.

(For other cases, see Admiralty, Dec. Dig. § 1.)

2. STATES—RESERVATION OF CONCURRENT JURISDICTION TO STATE COURTS DOES NOT AUTHORIZE CREATION OF SUBSTANTIVE RIGHTS.

As, under Const. art. 6, cl. 2, declaring the Constitution and the laws adopted in pursuance thereof the supreme law of the land, the state courts may, and unless inhibited must, apply federal laws, a mere reservation of partially concurrent jurisdiction to such courts by an act of Congress conferring an otherwise exclusive jurisdiction on national courts cannot create substantive rights or obligations or indicate assent to th ir creation by the states.

(For other cases, see States, Dec. Dig. § 4.)

5. ADMIRALTY—SAVING REMEDIES UNDER STATE WORKMEN'S COMPENSATION LAW FOR MARITIME INJURIES UNCONSTITUTIONAL.

Act Oct. 6, 1917, amending Judicial Code, §§ 24, 256 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 991[3], 1233), relative to the jurisdiction of federal courts, so as to save to suitors in all cases the right of a common-law remedy, etc., "and to claimants the rights and remedies under the workmen's compensation law of any state," seeks to authorize and sanction actions by the states in prescribing and enforcing rights, obligations, liabilities, and remedies designed to provide compensation for injuries of employees engaged in maritime work, and, as so construed, is beyond the power of Congress, as its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement cannot be delegated to the states, especially as it would destroy the uniformity contemplated by the Constitution.

(For other cases, see Admiralty, Dec. Dig. § 1.)

Mr. Justice Pitney, Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke, dissenting.

In error to the Supreme Court of the State of New York, Appellate Division, Third Department.

Proceeding by Lillian E. Stewart for compensation under the Workmen's Compensation Law for the death of her husband, William M. Stewart, opposed by the Knickerbocker Ice Company, employer. Compensation

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was awarded, and the award affirmed by the Appellate Division (187 App. Div. 915, 173 N. Y. Supp. 924), and by the Court of Appeals (226 N. Y. 302, 123 N. E. 382), and the employer brings error. Reversed and remanded with directions.

Mr. Frank R. Savidge, of New York City, for plaintiff in error.
Mr. E. Clarence Aiken, of Albany, N. Y., for defendant in error.

JUSTICE MCREYNOLDS delivered the opinion of the court.

While employed by Knickerbocker Ice Company as bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson river and drowned—August 3, 1918. His widow, defendant in error, claimed under the workmen's Compensation Law of New York; (Consol. Laws N. Y. c. 67) the Industrial Commission granted an award against the Company for her and the minor children; and both Appellate Division and the Court of Appeals approved it. *Stewart v. Knickerbocker Ice Co.*, 226 N. Y. 302, 123 N. E. 382. The later concluded that the reasons which constrained us to hold the Compensation Law inapplicable to an employee engaged in maritime work—*Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C. 451, Ann. Cas. 1917E, 900—had been extinguished by "An act to amend Sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the District Courts, so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any State" approved October 6, 1917. 40 Stat. c. 97 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § § 991 [3], 1233).

The provision of Section 9, Judiciary Act, 1789 (1 Stat. 76, c. 20), granting to United State Districts Courts, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." was carried into the Revised Statutes (secs. 563 and 711 [Comp. St. § 1233]) and thence into the judicial Code (clause 3, secs. 24 and 256 [Comp. St. § 991(3), 1233]). The saving clause remained unchanged until the statute of October 6, 1917, added *"and to claimants the rights and remedies under the Workmen's Compensation Law of any State."**

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*Judiciary Act, Sept. 24, 1789, ch. 20, 1 Stat. 73, 76, 77:

Sec. 9. That the district courts shall have, exclusively of the courts of the several States . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizure under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; . . .

Rev. Stats. Sec. 563. The district courts shall have jurisdiction as follows: . .

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitor in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paagraph six of section six hundred and twenty-nine.

Rev. Stats. Sec. 711. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

The Judicial Code—

Sec. 24. The district courts shall have original jurisdiction as follows: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction saving to suitors in all cases the right of a common law remedy where the common law is competent to give it; . . .

Sec. 256. The jurisdiction vested in the courts of the United States in the cases

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In *Southern Pacific Co. v. Jensen* (May 1917). 244 U. S. 205, 37 Sup. Ct. 524, 61 L. E. D. 1086, L. R. A. 1918C, 451 Ann. Cas. 1917E, 900 we declared that under Section 2, Article III, of the Constitution ("The Judical Power shall extend to . . . all cases of admiralty and maritime jurisdiction") and Section 8, Article I (Congress may make necessary and proper laws for carrying out granted powers), "in the absence of some controlling statute the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to the matters within admiralty and maritime jurisdiction", also that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." And we held that, when applied to maritime injuries, the New York Workmen's Compensation Law conflicts with the rules adopted by the Constitution and to that extent is invalid. "The necessary consequence would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common law remedies, whereas the remedy prescribed by the compensation law was unknown to the common law and incapable of enforcement by the ordinary processes of any court. Moreover, if applied to maritime affairs, the statute would obstruct the policy of Congress to encourage investments in ships.

In *Chelentis v. Luckenbach S. S. Co.* (June, 1918) 247 U. S. 372, 38 Sup. Ct. 501, 62 L. ED. 1171, an action at law seeking full indemnity for injuries received by a sailor while on shipboard, we said:

"Under the doctrine approved in *Southern Pacific Co. v. Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

And, concerning the clause, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," this:

"*In Southern Pacific Co. v. Jensen* we definitely ruled that it gave no authority to the several States to enact legislation which would work 'material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations.' " Under the saving clause a right sanctioned by the maritime law may be enforced through any appopriate

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and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . .

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy; where the common law is competent to give it.

Act Oct. 6, 1917, ch. 97, 40 Stat. 395.

That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is compenent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."

Sec. 2. That clause three of section two hundred and fifty-six of the Judicial Code is hereby amended to read as follows.

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State."

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remedy recognized at common law but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the States so to do. It referred only to remedies and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law.

In Union Fish Co. v. *Erickson,* 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261, an admiralty cause, a master sought to recover damages for breach of an oral contract with the owner of a vessel for sevices to be performed principally upon the sea. The latter claimed invalidity of the contract under a statute of California, where made, because not in writing and not to be performed within a year. We ruled:

"The Circuit Court of Appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of California relied upon by the petitioner." "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made. See also *The Blackheath,* 195 U. S. 361, 365, 25 Sup. Ct. 46, 47, 49 L. Ed. 236.

[1] As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To presrve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several States—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago.

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. . . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna,* 21 Wall. 558, 574, 575 (22 L. Ed. 654).

The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been

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if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman v. New York City,* 179 U. S. 552, 557, *et seq.* 21 Sup. Ct. 212, 45 L. Ed. 314.

[2] The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. Also, it should be noted that Federal laws are constantly applied in State courts—unless inhibited their duty so requires. Constitution, Art. VI, Clause 2; *Second Empolyer's Liability Cases,* 223 U. S. 1, 55, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts, could not create substantive rights or obligations or indicate assent to their creation by the States.

When considered with former decisions of this court, a satisfactory interpretation of the Act of October 6, 1917, is difficult, perhaps impossible. *The Howell* (D. C.) 275 Fed. 578, and *Rohde v. Grant Smith Porter Co.* (D. C.) 259 Fed. 304, illustrate some of the uncertainties. In the first, the District Court in New York dismissed a libel, holding that rights and remedies prescribed by the Compensation Law of that State are exclusive anad *pro tanto* supersede, the maritime law. In the second, the District Court of Oregon ruled that when an employee seeks redress for a maritime tort by an admiralty court, rights, obligations and liabilities of the respective parties must be measured by the maritime law and these cannot be barred, enlarged or taken away by state legislation. Other difficulties hang upon the unexplained words "workmen's compensation law of *any* State."

[3, 4] Moreover, the Act only undertook to add certain specified rights and remedies to a saving clause within a code section conferring jurisdiction. We have held that before the amendment and irrespective of that section, such rights and remedies did not apply to maritime torts because they were inconsistent with paramount Federal law—within that field they had no existence. Were the added words therefore wholly ineffective? The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlich, Interpretation of Statutes, Sec. 372.

Neither branch of Congress devoted much debate to the Act under consideration—altogether, less than two pages of the Record (65th Cong., pp. 7605, 7843). The Judiciary Committee of the House made no report; but a brief one by the Senate Judiciary Committee, copied below,* probably indicates the general legislative purposes. And, with this and accompanying circumstances, the words must be read.

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*65th Congress, 1st Session. Senate Report No. 139. Amending the Judicial Code. October 2, 1917.—Ordered to be printed. Mr. Ashurst, from the Committee on the Judiciary, submitted the following Report. [To accompany S. 2916.]:

The committee on the Judiciary, to which was referred the bill (S. 2916.) to amend sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so to save to claimants the rights and remedies under the workmen's compensation law of any State, having considered the same, recommend its passage without amendment.

The Judicial Code, by sections 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of common law remedy where the common law is competent to give it." It was declared by the Supreme Court of the United States in the case of Southern Pacific Co. v. Jensen that "the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the compensation law of any State. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies

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[5]. Having regard to all these things, we conclude that Congress undertook to permit application of Workmen's Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by *Southern Pacific Co. v. Jensen*. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. *See Sudden & Christenson Industrial Accident Commission*, (Cal.) 188 Pac. 803.

Congress cannot transfer its legislative power to the States—by nature this is non-delegable. *In re Rahrer*, 140 U. S. 545, 560; 11 Sup. Ct. 865, 35 L. Ed. 572; *Field v. Clark*, 143 U. S. 649, 692; 12 Sup. Ct. 495, 36 L. Ed. 294; *Buttfield v. Stranahan*, 192 U. S. 470, 496 24 Sup. Ct. 349 48 L. Ed. 525; *Butte City Water Co. v. Baker*, 196 U. S. 119, 126, 25 Sup. Ct. 211, 49 L. Ed. 409; *Interstate Com. Comm. v. Goodrich, Transit Co.*, 224 U. S. 194, 214, 32 Sup. Ct. 436, 56 L. Ed. 729.

In *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, notwithstanding the contention that it violated the Constitution—Art. I, Sec. 8, Clause 3—this court sustained an act of Congress which prohibited the shipment of intoxicating liquors from one State into another when intended for use contrary to the latter's laws. Among other things, it was there stated that—

The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress," i. e., Congress itself forbade shipments of a designated character.

And further:

"The exceptional nature of the subject here regulated is the basis

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are included in the bill. The bill if enacted will not disrupt the admiralty jurisdiction of the Federal courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, State and Federal, should exist over certain matters. Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts it will now be possible for the State, through its compensation plan, to determine the rights of the parties concerned. In other words, there being concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan.

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upon which the exceptional power exerted must rest," i. e., different considerations would apply to innocuous articles of commerce.

The reasoning of that opinion proceeded upon the postulate that because of the peculiar nature of intoxicants which gives enlarged power concerning them, Congress might go so far as entirely to prohibit their transportation in interstate commerce. The statute did less.

We can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accept the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power."

See *Delameter v. South Dakota*, 205 U. S. 93, 97, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733.

Here, we are concerned with a wholly different Constitutional provision—one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.

In *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that State which permitted recovery by an ordinary action for fatal injuries, and the power of a State to supplement the maritime law to that extent was recognized. But here the state enactment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court. *See N. Y. Cent. R. R. Co.* v. *White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667 L. R. A. 1917D. 1, Ann. Cas. 1917D, 629. *N. Y. Cent. R. R. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; *Southern Pacific Co. v. Jensen, supra.* The doctrine of *The Hamilton* may not be extended to such a situation.

The judgment of the court below must be reversed and the cause remanded with directions to take further proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE HOLMES, dissenting.

In Southern Pac. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086 L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, the question was whether there was anything in the Constitution or laws of the United States to prevent a State from imposing upon an employer a limited but absolute liability for the death of an employee upon a gang-plank between a vessel and a wharf, which the State unquestionably could have imposed had the death occurred on the wharf. A majority of the Court held the State's attempt invalid, and thereupon, by an Act of October 6, 1917, c. 97, 40 Stat. 395, Congress tried to meet the effect of the decision by amending § 24, cl. 3, and § 256, cl. 3, of the Judicial Code; Act of March 3, 1911, c. 231; 36 Stat. 1087. Those sections in similar terms declared the jurisdiction of the District Court and the exclusive jurisdiction of the Courts of the United States, "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a

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common law remedy where the common law is competent to give it." The amendment added, "and to claimants the rights and remedies under the workmen's compensation law of any State." I thought that claimants had those rights before. I think that they do now both for the old reasons and for new ones.

I do not suppose that anyone would say that the words, "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction," Const. Art. III, Sect. 3, by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment. But somehow or other the ordinary common law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several States, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. But surely the power that imposed the liability can change it, and I suppose that Congress can do as much as the judges who introduced the rules. For we know that they were introduced and cannot have been elicited by logic alone from the mediaeval sea laws.

But if Congress can legislate it has done so. It has adopted statutes that were in force when the Act of October 6, 1917, was passed, and to that extent has acted as definitely as if it had repeated the words used by the several States—a not unfamiliar form of law. *Gibbons* v. *Ogden*, 9 Wheat. 1, 207, 6 L. Ed. 23; *Hobart v. Drogan*, 10 Peters, 108, 119, 9 L. Ed. 363; *Cooley v. Board of Wardens*, 12 How. 299, 317, 318 13 L. Ed 996; *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U. S 79, 84, 85, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555; *Franklin v. United States*, 216 U .S. 559 30 Sup. Ct. 434, 54 L. Ed. 615; *Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.*, 237 U. S. 300, 303 35 Sup. Ct. 598, 59 L. Ed. 965. An act of Congress, we always say, will 965. An Act of Congress, we always say, will be construed so as to sustain it, if possible, and therefore if it were necessary, the words "rights and remedies under the workmen's compensation law of any State" should be taken to refer solely to laws existing at the time, as it certainly does at least include them. See *United States* v. *Paul*, 6 Peters 141 8 L. Ed. 348. Taking the act as so limited it is to be read as if it set out at length certain rules for New York, certain others more or less different for California, and so on. So construed the single objection that I have heard to the law is that it makes different rules for different places, and I see nothing in the Constitution to prevent that. The only matters with regard to which uniformity is provided for in the instrument so far as I now remember, are duties, imposts, and excises, naturalization and bankruptcy, in article I, section 8. As to the purpose of the clause concerning the judicial power in these cases nothing is said in the instrument itself. To read into it a requirement of uniformity more mechanical than is educed from the express requirement of equality in the Fourteenth Amendment seems to me extravagant. Indeed it is contrary to the construction of the Constitution in the very clause of the Judiciary Act that is before us. The saving of a common law remedy adopted the common law of the several States within their several jurisdictions, and, I may add by way of anticipation, included at least some subsequent statutory changes. *Steamboat Co.* v. *Chase*, 16 Wall. 522, 530-534. 21 L. Ed. 369; *Knapp, Stone & Co. Company v. McCaffrey*, 177 U. S. 638, 645, 646 20 Sup. Ct. 824, 44 L. Ed. 921; *Rounds* v.*Cloverport Foundry & Machine Co.*, 237 U. S. 303, 307, 35 Sup. Ct. 596. 59 L. Ed. 966. I cannot doubt that in matters with which Congress is empowered to deal it may make different arrangements for widely different localities with perhaps widely different needs. *See United States*

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v. Press Publishing Co., 219 U. S. 1, 9, 31 Sup. Ct. 212, 55 L. Ed. 65,21 Ann. Cas. 942.

I thought that *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326 L. R. A. 1917D. 1218 Ann. Cas. 1917B, 845, went pretty far in justifying the adoption of state legislation in advance, as I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it. But I can see no constitutional objection to such an adoption in this case if the Act of Congress be given that effect. I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the States and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what for the time being exists. A familiar example is the law directing the common law practice &c., in the District Courts to 'conform, as near as may be, to the practice &c., existing at the time' in the State Courts. Rev. Sts § 914 (Comp. St. § 1537). This was held by the unanimous Courts to be binding in *Amy* v. *Watertown, No.* 1, 130 U. S. 301, 9 Sup. Ct. 530 32 L. Ed. 946. *See Gibbons* v. *Ogden*, 9 Wheat. 1, 207, 208, 6 L. Ed. 23;*Cooley* v. *Board of Wardens*, 12 How. 299, 317, 318. 13 L. Ed. 996. I have mentioned the scope given to the saving of a common law remedy and have referred to cases on the statutes adopting state pilotage lawas. Other instances are to be found in the Acts of Congress, but these are enough. I think that 996. I have mentioned the scope given to the saving of a common law remedy and have referred to cases on the statutes adopting State pilotage laws. Other instances are to be found in the Acts of Congress, but these are enough. I think that the same principle applies here. It should be observed that the objection now dealt with is the only one peculiar to the adoption of local law in advance. That of want of uniformity applies equally to the adoption of the laws in force in 1917. Furthermore we are not called on now to consider the collateral effects of the act. The only question before us is whether the words in the Const'tution, 'The judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction' prohibit Congress from passing a law in the form of the New York Workmen's Compensation Act—if not in its present form, at least in the form in which it stood on October 6. 1917. I am of opinion that the New York law at the time of the trial should be applied and that the judgment should be affirmed.

Mr. Justice Pitney, Mr. Justice Brandies and Mr. Justice Clarke concur in this opinion.

GLOBE INDEMNITY CO. v. HOOK et al. (Civ. 3277.)

(District Court of Appeal, First District, Division 2, California. March26, 1920. Hearing Denied by Supreme Court May 20, 1920.)

189 Pacific Reporter 797.

1. MASTER AND SERVANT — EMPLOYEE STEPPING INTO ELEVATOR WELL IN DARKNESS HELD NEGLIGENT PRECLUDING RECOVERY OVER BY COMPENSATION INSURER.

Employee who in darkness stepped into elevator well without attempting to ascertain whether elevator was at floor, but looking behind him

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with his companion, was negligent precluding recovery over against owners and lessees of building by workmen's compensation insurer.

(For other ceases, see Master and Servant, Dec. Dig. § 389.)

3. MASTER AND SERVANT—EVIDENCE HELD CONCLUSIVELY TO SHOW CONTRIBUTORY NEGLIGENCE OF DECEASED EMPLOYEE.

In action by workmen's compensation insurer of employers of one who stepped in darkness into elevator shaft of building owned by some other and leased by them to other defendants, evidence *held* to show conclusively that deceased employee was guilty of contributory negligence in stepping into the shaft without endeavoring to ascertain whether elevator was at floor.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Globe Indemnity Company against W. S. Hook, Jr., and wife, and Geo. Rice & Sons, a corporation. From judgment of nonsuit, plaintiff appeals. Affirmed.

Lewis Cruickshank and Vincent B. Vaughan, both of Los Angeles, for appellant.

R. P. Jennings and Jefferson P. Chandler, both of Los Angeles, for respondents W. S. Hook, Jr., and Myrtle Wood Hook.

Hollzer & Greenberg and Joe Crider, Jr., all of Los Angeles, for respondent George Rice & Sons.

NOURSE, J. This is an appeal from a judgment in favor of defendants following an order granting their motion for nonsuit. Plaintiff sued as surety in subrogation under the provisions of the "Workmen's Compensation, Insurance and Safety Act" (St. 1917, p. 831), to recover damages for negligence on the part of the defendants resulting in the death of one Eugene P. Nolan. The decedent was an employe of the Pacific Knitting Mills, with which the plaintiff had made a contract of compensation insurance. Plaintiff had paid the award made by the Industrial Accident Commission to the dependents of decedent.

The facts of the case are: That the Pacific Knitting Mills maintained and operated an establishment on the fourth floor of a building situate in the city of Los Angeles and owned by the defendants Hook and leased by the defendant Geo. Rice & Sons. Means of ingress and egress to the said fourth floor was by way of a passenger elevator and a stairway in the front part of the building and a freight elevator in the rear of the building. The stairway was always open. The passenger elevator in the front of the building was operated between the hours of 7 a. m. and 5 o'clock p. m., and the freight elevator was used by employes of the company at their convenience. Decedent and one Stewart on the day of the injury entered the rear of the building at about 5:30 p. m. on a dark night on their way to the fourth floor for the purpose of attending to their duties. They approached the elevator shaft, which was without light of any kind, and Stewart raised the gate which guarded the elevator shaft, stuck his foot into the shaft to feel the elevator, and continued on down to the bottom of the well, receiving slight injuries. Decedent, who was by his side, followed him immediately into the well and struck the bottom in such a way as to receive injuries which resulted in his death. Neither party made any effort to ascertain whether the elevator was at the ground floor other than as just stated. Both were looking back at the time they stepped into the well, and both were thoroughly familiar with the danger which they assumed.

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Stewart, who was the only eyewitness to what occurred, testified in part as follows:

That his automobile was standing in the street directly in front of the freight elevator, and he went to the automobile and turned the dimmers down; that he and decedent reached the elevator at the same time, and reached down and raised the gate of the elevator; that at that time there was no lights in the elevator nor street lights in the vicinity to light up the elevator shaft. "I reached down and pulled the gate up and stuck my foot in to feel if the elevator was there, and just as I did that he (decedent) spoke to me and said, 'Your lights are not on.' * * * And instinctively as he said that, although I knew the lights were on, I turned around to look; and then just a subconscious thought, whatever it was, I had in my mind to step in there, and I stepped in. All I thought was, all the way down, 'This elevator is a long way below the floor,' because it never stopped right at the floor. * * * The elevator was above instead of below. * * * We both stepped in together into the shaft."

The same witness testified that they could have entered the front door and walked up the front stairs; that, though the elevator in the rear was for freight, it had been used by employes of the knitting mills as a passenger elevator for about three years prior to the accident; that, though the freight elevator was frequently at or near the ground floor, it was often either in the basement or at one of the upper floors; and that both he and decedent had frequently been required to pull the cable in order to bring the elevator up or down to the ground floor, but in the nighttime "generally from an upper floor down; in fact, always. I don't know of a case where I raised the elevator from the basement after dark."

The testimony of the witness Stewart was the only evidence offered by plaintiff showing the circumstances under which the accident occurred. There is therefore no conflict in the evidence in this particular. The only point urged upon appeal requiring consideration is whether this evidence presented such a case of contributory negligence on the part of decedent as to justify the trial court in taking the case from the jury, it being conceded that the same principles of law as to contributory negligence are applicable to a surety suing in a case of this nature as are applicable in a case brought directly by the one injured or his legal representatives.

[1] From the evidence it appears that decedent knew of the danger and assumed the risk without taking any precautions or care to avoid injury. No explanation is given to account for his conduct. Reasonable prudence would require any one approaching a place of known danger to use some care, at least, for his own safety. But the evidence here is not only that decedent stepped into the elevator well without attempting to ascertain whether the elevator was at the floor, but that at the very time he and his companion entered the well they were both looking behind them into the street. One may not thus heedlessly disregard the ordinary precautions which prudence would require to be taken for his own safety.

[2] From this statement of the evidence the propriety of the nonsuit is apparent. As the Supreme Court said in Loftus v. Pac. Elec. Ry. Co., 166 Cal. 464, 467, 137 Pac. 34, 35:

"Ordinarily, of course, the question whether a plaintiff has been guilty of contributory negligence is one of fact for the jury. It becomes a question of law for the decision of the court only where the facts are undisputed, and, even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence."

And again, in Kauffman v. Machine Shirt Co., 167 Cal. 506, 511, 140 Pac. 15, 17:

"It is true that ordinarily the question of contributory negligence

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is one largely of fact for the consideration of the jury, but where the standard of conduct required of persons under given circumstances has been plainly neglected by the person seeking relief, it then becomes a question of law." McGraw v. Friend, etc., Lumber Co., 120 Cal. 574, 579, 52 Pac. 1004.

[3] The evidence here is of such a nature that no deduction or inference other than that the decedent was guilty of contributory negligence could be drawn and reasonable minds could not have honestly reached a different conclusion.

For these reasons the order of the trial judge granting the motion to nonsuit plaintiff was proper, and the judgment is accordingly affirmed.

I concur: Langdon, P. J.

Mr. Justice Brittain, deeming himself disqualified to act in this case, does not participate in its determination.

SADDLEMIRE v. AMERICAN BRIDGE CO.

(Supreme Court of Errors of Connecticut. May 7, 1920.)

110 Atlantic Reporter 63.

1. MASTER AND SERVANT—MODIFICATION OF AWARD CAN ONLY BE MADE ACCORDING TO COMPENSATION ACT.

A modification of an award of a commissioner under the Workmen's Compensation Act can be made only upon proceedings taken in accordance with Pub. Acts 1913, c. 138, § 15, as amended by Pub. Acts 1915, c. 288, § 9.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—NOTICE OF MODIFICATION OF AWARD OF COMPENSATION SHOULD BE DEFINITE.

A notice of hearing on the modification of an award under Workmen's Compensation Act, § 15, as amended by Pub. Acts 1915, c. 288, § 9, is an order, and should approximate an order of court in its definiteness and its form, and should specifically bring the claim under some one or more of the statutory causes authorizing a modification of an award.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

3. MASTER AND SERVANT—NOTICE OF MODIFICATION OF AWARD OF COMPENSATION NOT PREJUDICIAL.

Where the record makes it clear that both the employer and an injured servant had full opportunity to present the issue of modification of an award under the Workmen's Compensation Act, and that such issue was fully heard and adjudicated without prejudice to any rights of the employer, the employer cannot complain that the notice of hearing was not in proper form.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

4. MASTER AND SERVANT—AWARD OF COMPENSATION SUBJECT TO MODIFICATION.

Award of compensation under the Workmen's Compensation Act is a creation of statute, and is subject to modification on the grounds specified in the statute, and there is nothing about it which has the finality of a judgment.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

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5. MASTER AND SERVANT—COMMISSIONER NEED NOT INCLUDE ALL INJURIES IN COMPENSATION AWARD.

Ordinarily all of the injuries to a servant may be included in one award under the Workmen's Compensation Act, but a commissioner need not include in a present award an injury whose extent or prognosis cannot be then determined.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

6. MASTER AND SERVANT — COMMISSIONER, BECAUSE OF DISQUALIFICATION, MAY DESIGNATE ANOTHER COMMISSIONER TO HEAR QUESTION OF MODIFICATION OF AWARD.

A commissioner, under the Workmen's Compensation Act, who has made an award for the loss of the right leg, and has left an injury to the left for further consideration, may designate another commissioner to hear the proceeding relative to a modification of the original award, where he deems himself disqualified to act.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

7. MASTER AND SERVANT—EXPRESSION OF BELIEF HAS NO PLACE IN FINDING BY COMPENSATION COMMISSIONER.

An expression of a belief by a commissioner under the Workmen's Compensation Act has no place in his finding, and must be disregarded, not being the finding of a fact.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

8. MASTER AND SERVANT—DISTINCT INJURIES TO LEGS ENTITLED EMPLOYEE TO COMPENSATION FOR EACH INJURY.

Under the Workmen's Compensation Act, one receiving a distinct injury to the right leg, resulting in its loss, and an injury to the left leg, resulting in total incapacity, the injured servant was entitled to compensation for each injury.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

9. MASTER AND SERVANT — INFECTION OF LEFT LEG FOLLOWING AMPUTATION OF RIGHT LEG ENTITLED SERVANT TO COMPENSATION FOR BOTH LEGS.

Compensation for the loss of a leg includes the loss of earning power during the cure, and such damages as are the ordinary and immediate instance of such a loss; but where, in consequence of the amputation of one leg, the other leg becomes infected, resulting in phlebitis and the loss of the use of such other leg, compensation may be had under Workmen's Compensation Act for the loss of both legs, and a modification of the original award for compensation for the loss of the leg amputated is authorized under section 15, pt. B, of the act, as amended by Pub. Acts 1915, c. 288, § 9.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

10. MASTER AND SERVANT—INJURY TO LEFT LEG, RENDERED BY THROWING WEIGHT THEREON BY REASON OF AMPUTATION OF RIGHT LEG, RESULT OF ACCIDENT UNDER COMPENSATION ACT.

Where a left leg was weakened in prior injury, and the servant lost his right leg by reason of another accident, and the loss of the right leg threw a strain and weight on the left leg, causing phlebitis to the left leg and rendering it useless, the phlebitis is not to be attributed to the prior in-

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jury, but to the last injury, which was its predisposing cause, under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

11. MASTER AND SERVANT—LOSS OF ONE LEG, RESULTING IN TOTAL INCAPACITY, ENTITLES SERVANT TO COMPENSATION FOR TOTAL INCAPACITY.

Where the loss of a leg in fact results in partial incapacity the provision in the Workmen's Compensation Act for compensation for the loss of a leg applies; but where the loss of a leg in fact results in total incapacity, the provision for compensation for the loss of a leg does not apply, the servant being entitled to compensation for toatal incapacity provided by Pub. Acts 1915, c. 288, § 7.

(For other cases, see Master and Servant, Dec. Dig. § 385[7].)

12. MASTER AND SERVANT — AWARD FOR PARTIAL INCAPACITY PROPERLY DEDUCTED FROM AWARD FOR TOTAL INCAPACITY.

Where the commissioner made an award for loss of right leg, under Workmen's Compensation Act, on modification of the award, by reason of an injury to the left leg, for total incapacity, commissioner, on hearing for modification, did not err in making an award covering all of the injuries and deducting therefrom payments already made under the former award; such disposition being practical and just.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Proceeding by William A. Saddlemire under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the American Bridge Company, the employer. There was an award of compensation which was affirmed by the superior court, and the employer appeals. No error.

The case was first heard by Commissioner Williams, who, on August 29, 1917, ordered defendant to pay $10 a week for 182 weeks for the loss of the right leg, and also the medical and surgical charges. The commissioner in his award said:

"This award does not include any payment for injuries or permanent disability to the left leg, but is solely for the loss of the right leg, and is without prejudice to the rights of claimant to ask for a hearing de novo on his claims for injuries to his left leg."

In the event of such rehearing the commissioner designated Dr. Donahue, commissioner of the Second district to hear the same. Commissioner Williams in this finding also said:

"From all that I can ascertain, I am now of the opinion that the condition of the claimant's left leg is due primarily to an injury sustained by him some years ago" (referring to the injury of 1908, hereafter described).

On October 4, 1918, plaintiff's attorney by letter requested Commissioner Williams to assign this case for a hearing before Dr. Donahue, as previously designated, and stated his claim as follows.

"I desire at this time to make claim for the injury resulting to Saddlemire, affecting his left leg, and affecting his total incapacity as a result of one leg and injury to the other leg, and I desire also to claim compensation for Saddlemire, which was a direct result and which resulted in him being confined to the hospital for a long period of time outside of the specific injury to his left leg."

On October 8, 1918, Commissioner Williams sent notice to the parties in interest as follows:

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"Certain claims are made which I consider myself disqualified to pass on: A claim for injuries to Saddlemire's left leg; a claim for diminished earning capaciay, due to his injuries as a whole; and a claim for incapacity payments between the date of his injury and the time of of his being cured, so far as he has been cured. You and each of you are therefore notified that the commissioner for the Second district, Dr. J. J. Donahue, has been designated to act for me in this case, and that he will hear and determine this matter at my office in Waterbury, on Thursday, October 31, 1918, at 9:30 a. m. ."

Commissioner Donahue, in making his award from which this appeal is taken, found the following facts: The plaintiff claimant, while working as a structural ironworker for the defendant in 1908, broke his left leg. The fracture was reduced and union obtained, and thereafter he continued his employment with defendant as a structural ironworker, and for one or two years wore an additional brace, but for six or seven years has not worn this appliance, did not limp as a result of the injury to his left leg, did not suffer pain or special inconvenience, but did the ordinary work of a structural ironworker, and was in comparatively good condition. He was and had been for two or three months prior to the accident a foreman in charge of a gang of men employed by the defendant. This did not require the same manual labor as was required of one of the employees, but it was stil necessary for him to climb about in the same way the employees did. On December 8, 1916, the plaintiff sustained a severe injury to his right leg, arising out of and in course of his employment. As a consequence his right leg was amputated on December 8th, but the operation was improperly performed, and a reamputation was necessary on January 12th. An infective process followed the second amputation, and the plaintiff for a time was in a critical condition. When the stump of the right leg was sufficiently healed, so that it was practicable for the plaintiff to get in a chair, it was found that the left leg could not be lifted or used without having it lifted by the orderly. On the trial an examination revealed a marked phlebitis in the left leg, which had followed as a result of the injury of December 8th.

The commissioner says in his finding:

"I belive it [the phlebitis] followed the trauma to the left leg." "Befor the accident of December 8th, the plaintiff's left leg was not perfect; but it was a useful leg, and had given him no trouble for some six years next preceding the injury of December 8th, and he had been doing the same work that any other structural ironworker does." "On December 8th he had two good useful legs, and could and did pursue his vocation as a structural ironworker. Since December 8th, as a result of his injury, he lost his right leg and his left leg has been changed from a useful and useable leg to one on which he can only stand at the utmost for half an hour, and that with pain and discomfort, and then is in a condition bordering on collapse; for doing work the left leg has become useless." "Since December 8, 1916, the condition of the plaintiff has been one of permanent total incapacity to work."

The commissioner also stated in his finding that whether the phlebitis followed as a result of the injury to the left leg, or as a result of the injury to the right leg, it had followed as a result of the injury of December 8th. The reasons of appeal which the defendant pursues are sufficiently stated in the opinion.

Arthur M. Marsh and Jonathan Grout, both of Bridgeport, for appellant.

Clayton L. Klein, of Waterbury, for appellee.

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WHEELER, J. (after stating the facts as above). The denial of the motion to correct the finding, by striking out paragraphs 17, 18, 20, and 21 of the finding, was correct. The evidence and the necessary inferences therefrom justified these findings.

The denial of the motion to add paragraphs 25 and 26 to the finding, was erroneous; but, as we shall show later in the opinion, whether these findings were in the finding or not would not affect the judgment or change the ruling upon questions involved.

The remaining reasons of appeal challenge the authority of Commissioner Williams to leave open for hearing de novo the claim for injury to the left leg, and insist that his decision was one of partial incapacity, covering the loss of the right leg and all consequences arising therefrom, and was final. They challenge the power and jurisdiction of Commissioner Donahue to reopen or modify the award, so as to become an award of total incapacity, since no motion, petition, or proceeding has been had to that end under section 15 of part B of the Compensation Act (Pub. Acts 1913, c. 138) as amended by section 9 of chapter 288 of the Public Acts of 1915, and they assert that Commissioner Donahue erred in his award for total incapacity, since the previous injury of 1908 resulted in partial incapacity, and this injury contributed in a material degree to the total incapacity found by the commissioner, and finally they press the point that, if Commissioner Donahue had any power or jurisdiction over the case, it was only to award compensation for such partial incapacity as resulted solely from the direct injury to the left leg, since the award of Commissioner Williams covered the loss of the right leg and all consequences arising therefrom.

[1] The authority of the commissioner is found in the Compensation Act, and the modification of the award of Commissioner Williams could be made only upon proceedings taken in accordance with section 15 of chapter 138 of the Public Acts of 1913, as amended by section 9 of chapter 288 of the Public Acts of 1915. The fundamental point in the case, of necessity, involves an interpretation of this section. It reads as follows:

"Section 15 of part B of said act is hereby amended to read as follows: Any award of or voluntary agreement concerning compensation made under this act shall be subject to modification, upon the request of either party and in accordance with the procedure for original determination, whenever it shall appear to the compensation commissioner that the incapacity of an injured employe has increased, decreased, or ceased, or that the measure of dependence, on account of which the compensation is paid, has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement or award in order to properly carry out the spirit of this act. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court."

The primary purpose of this section of the act is to give compensation to the injured employe in measure as fixed by the statute, and to give no more; to limit the compensation for the incapacity of the injured employe, or for the measure of dependence, to the duration of the injury and incapacity, or of the measure of dependence; to increase the compensation within the statutory measure, in so far as the incapacity or dependence has increased, and in the event of a decrease in the incapacity or the dependence to decrease the compensation to the extent of this decrease; and in order to cover any possible contingency the statute finally provides that every award made is subject to modification whenever changed conditions of fact have arisen which necessitate a change of such award in order to properly carry out the spirit of the act.

The modification of the award can be obtained for the causes and through the procedure specified in the statute. The procedure authorized is a request to the commissioner by either party for a modification made

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in the form adopted in a claim for an award. The causes which will authorize the modification are the satisfying of the judgment of the commissioner that the incapacity of the injured employe, or the measure of dependence, has (1) increased; or (2) decreased; or (3) ceased; or (4) that changed conditions of fact have arisen which necessitate a change of such award in order to properly carry out the spirit of the statute.

[2] The procedure in bringing this claim for a modification of the original award should not serve as a precedent; it is not in the form of an original determination, nor is the notice of hearing in the most approved form. This is an order, and should approximate an order of court in its definiteness and its form, and in every case should specifically bring the claim under some one or more of the statutory causes authorizing a modification of an award.

[3] But the record makes it clear that each of the parties had such notice as to give them full opportunity to present to Commissioner Donahue the issue of modification, and that that issue was fully heard and adjudicated without prejudice to any rights of the defendant which cannot be protected upon this appeal. Matters of procedure in compensation cases, which do not affect prejudicially the rights of parties, will not avail upon appeal. Unless such rights be thus affected, the form of procedure before the compensation commissioner is exclusively for his determination.

[4] The defendant attempts to liken the award to the judgment of a court and the proceedings to modify the award to that for a new trial. There is no such similitude. The award is subject to modification at any time for the causes named in the statute, and these are radically different from causes which give ground for a new trial. The award is the creation of statute; it is subject to modification upon the grounds specified in the statute. There is nothing about it which has the finality of a judgment.

There was no question of dependency involved. The claims contained in the order of Commissioner Williams for a hearing were: For injuries to the left leg; for diminished earning capacity due to the injuries as a whole; for payments for incapacity between the date of injury and the time of cure, so far as claimant has been cured. This method of stating the claims does not follow the statute, but we think the parties were not misled, and that not only was the injury to the left leg and all of its consequences involved, but also any increased incapacity was necessarily involved in a claim for diminished earning capacity due to the injuries as a whole. Commissioner Williams concluded his memorandum of decision thus:

"The award is purely for the loss of the right leg, and is without prejudice to the rights of the claimant to ask for a hearing de novo on his whole claim for injuries to his left leg."

[5] Ordinarily all of the injuries may be included in one award, but it may well be that it will be inadvisable to include in a present award an injury whose extent or prognosis cannot be then determined. We cannot say that Commissioner Williams exercised his discretion wrongly in confining the award to the loss of the right leg.

[6] His designation of Commissioner Donahue to conduct the further hearing, because of his own disqualification, was within his power. It was unfortunate that the matter had to be heard by another commissioner. Every effort should be made to avoid disqualification, so that the same commissioner may conduct the subsequent hearing, or the hearing for a modification of the original award. Commissioner Williams further states in his memorandum that he is now of the opinion that the condition of the claimant's left leg is due primarily to an injury sustained by him some years ago, and secondarily to the fact that the loss of the right leg has caused an undue strain and weight

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on the left leg, which in its weakneed condition, owing to the previous injury, it cannot bear.

[7] The commissioner was of the opinion that this was a direct result of the loss of the right leg and covered by the specific award made. This conclusion was an opinion, and cannot be treated as an adjudication, as the defendant insists. Commissioner Donahue found that there was a total incapacity of the left leg, due to phlebitis. In his finding he says he believes this followed the trauma to the left leg. An expression of a belief has no place in a finding; it is not the equivalent of a finding of fact, and must be disregarded.

[8] We have suggested heretofore that findings of commissioners be made in the manner and form of findings of the superior court. Only ultimate facts and the conclusion of the commissioner should appear, together with the rulings made, and the claims of the parties, with the award made. The reasons and arguments should be kept for the memorandum of decision. The findings of compensation commissioners not infrequently depart from our rule, and, instead of stating the facts, give parts of the evidence, expressions of witnesses, and the opinion and belief of the commissioner. Had there been a definite finding, supported by the evidence that the phlebitis followed the trauma to the left leg, further discussion would have been unnecessary. But, although this finding does not appear, we think the commissioner can be justified in his conclusion. He does find that, whichever way it came, whether as a result of the trauma to the left leg or from infection following the amputation of the right leg, the phlebitis in the left leg followed as a result of the injury of December 8th. If the phlebitis did result from the injury to the left leg, compensation must be awarded; for the injury to the right and left legs were separate injuries, compensation for the injury to the left leg had never been made. Olmstead v. Lamphier, 93 Conn. 26, 28, 104 Atl. 488.

[9] If the phlebitis came from an infection following the amputation of the right leg, the defendant contends that this was a direct consequence of the injury to the right leg, and was compensated in the award for its loss. Compensation for the loss of a leg includes the loss of earning power during the cure and such damages as are the ordinary and immediate incidents of such a loss. But where, in consequence of the amputation, injuries result which are distinguishable from those immediate results of the amputated limb, for example, if a nervous disorder ensue, or blood poisoning set in, or a phlebitis develops, affections such as these were not intended by the Compensation Act to be compensated in the loss of this member. They are not the normal and immediate incidents of the lost member.

We pointed out in Kramer v. Sargent & Co., 93 Conn. 28, 104 Atl. 490, that the specified injuries in Rev. 1918, § 5352, for the loss of a member, will ordinarily involve a period of incapacity, of varying duration. The defendant relies upon a sentence at the close of the opinion that the award "was also intended to cover all of the injuries resulting from the loss of the member." This statement, as the opinion shows, had reference to the immediate point involved, whether the incapacity resulting from the loss of a member during the duration of the cure was included in the award.

All of the injuries resulting from the loss of the member include those ordinary, natural, and immediate results of the loss of the member. When the results are unusual and are not the ordinary incidents following the amputation, and partial or total incapacity results, this is not to be attributed to the loss of the member, and is specifically included in the cases which section 15 of part B of the act provides shall authorize a modification of the original award.

[10] Commissioner Donahue held that the phlebitis must be attributed to the injury of December 8th. The correctness of this ruling is one of the chief grounds of the appeal. The defendant claims that Commissioner Williams was right in his conclusion that the phlebitis resulted

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primarily from the weakened condition of the left leg, due to the injury of 1908, and secondarily to the added strain and weight put upon the left leg, by reason of the loss of the right leg.

If we assume this condition, a weakened left leg, due to a prior injury, predisposing it to phlebitis, if the unusal strain and weight were placed upon it, and the injury of December 8th, the loss of the right leg, throwing this strain and weight on the left leg, which caused phlebitis to the left leg and rendered it useless, the phlebitis is not to be attributed to the prior injury, but to the last injury, which was its predisposing cause. Hartz v. Hartford Faience Co., 90 Conn. 539, 542, 97 Atl. 1020, involved the same principle. A condition of hernia existed, and the strain of lifting aggravated the condition, resulting in death. The last injury developed the ailment which caused the condition of total incapacity, and a compensation for the last injury properly includes this final consequence of the injury.

[11] The defendant argues with confidence that, if a one-legged man loses his other leg, he is entitled only to the specified compensation for the loss of the last leg. But this cannot be so; else, if he loses each leg at different times, he is merely entitled to the compensation specified for the loss of each leg, and these combined would not equal the award for total incapacity. Our statute did not intend a consequence leading to such injustice. Section 7 of chapter 288 of the Public Acts of 1915 reads as follows:

"In case the injury results in total incapacity to work there shall be paid. * * *"

This compensation is greater than that given for partial incapacity in the loss of a leg above the knee. The injury of December 8th resulted in the plaintiff's total incapacity, and the literal reading of the statutory provision for total incapacity brings the plaintiff's case within it. When the loss of a leg in fact results in partial incapacity, the provision for compensation for the loss of a leg applies. Where the loss of a leg, in fact results in total incapacity, the provision for compensation for the loss of a leg does not apply.

An act like that of Massachusetts makes no attempt to apportion the responsibility for a total incapacity, part to a former injury, and part to a present injury. The plaintiff's condition of partial incapacity following the prior injury has been transformed into a total incapacity by reason of the loss of the right leg and its resulting consequences. Logically and practically the injury to the leg should be held to be the cause of the total incapacity. The prior injury injured his left leg, but left it so that it was a useful leg. The injury of December 8th took away his leg and made his left leg useless. Branconnier's Case, 223 Mass. 273, 111 N. E. 792. Cases in other jurisdictions, which reach a different conclusion, are so affected by their local statutes that we do not deem it important to differentiate them from this decision.

[12] We do not think the defendant interprets the award of Commissioner Donahue aright; in reality his award does not set the award of Commissioner Williams aside. He makes an award covering all of the injury, that which was not included in the former award and for the increased injury and incapacity, and from this total, which was the utmost the plaintiff could receive, he deducts payments already made under the former award. That disposition of the matter is at once practical and just and within the Compensation Act.

There is no error.

The other Judges concurred.

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RUDNICK et al. v. WHITE BROS.

(Superior Court of Delaware. New Castle. May 13, 1920.)

109 Atlantic Reporter 881.

1. MASTER AND SERVANT—FINDING THAT PARENTS OF DECEASED WERE NOT DEPENDENT WITHIN COMPENSATION ACT, HELD WARRANTED.

In a proceeding by the parents of a deceased employee under the Workmen's Compensation Act, *held*, though decedent gave his mother practically all of his wages, yet, as the father was only 42 years old, in good health, and able to follow his occupation, and the sister, earning $120 a month, contributed nothing to the suport of her parents, a finding that the parents were not dependent was warranted.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

3. MASTER AND SERVANT—AWARD UNDER COMPENSATION ACT TREATED BY COURTS AS VERDICT.

An award by the Industrial Accident Board under the Workmen's Compensation Act will be treated as having the same force as a verdict, and will not be disturbed, if supported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Proceedings under the Workmen's Compensation Act (Rev. Code 1915, §§ 3101-3193) before the Industrial Accident Board (No. 9026, November 15, 1919), by Fred Rudnick and Lena Rudnick to obtain compensation for the death of Jacob Rundnick, their son, against White Bros., the employer. The Industrial Accident Board disallowed the claim for compensation, and the claimants appeal. Award sustained.

Pennewill, C. J., and Boyce and Conrad, JJ., sitting.

Philip L. Garrett, of Wilmington, for claimants.
William S. Hilles, of Wilmington, for employer.

The reasons assigned for the appeal are briefly: It appears from the decision and judgment of the board: (1) That the claimants and appellants were dependents of the deceased; (2) that a full hearing of all the material facts bearing upon the claim was not had before the board; and (3) that the board applied a test which is erroneous as a matter of law, namely, whether or not the claimants could support life without the contributions of the deceased.

A majority of the board found that the claimants "were not dependent to any extent upon Jacob Rudnick for support at the time of his death."

Under the statute and rule of court, appeals from the Industrial Accident Board are heard by the court from the record of the proceedings before the board, without the aid of a jury. Section 111 (Code, § 3193r) 30 Del. Laws, 540.

For the appellants the record was relied on to sustain the several grounds of appeal.

For the appellee it was urged: (a) That dependency under the act cannot be presumed, but must be established to the satisfaction of the court, and the board having found as a fact that dependency did not exist, the court should not reverse the finding, Bradbury's Workmen's Compensation, pp. 1071, 1076, 1082, 1084, 1089, 1091, 1094, 1096, and 1098; (b) that the record fails to disclose that the board omitted to receive or consider any testimony offered, or what material facts bearing upon the claim was not heard by that board; and (c) that it appears that the board did not

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apply the test of whether or not the claimants could support life without the contribution of the deceased, but on the contrary said:

"The test of dependency is not whether the familiy could support life without the contribution of the deceased, but whether they depended upon them as a part of their income or means of living." Shaw Co. v. Palmatory, 7 Boyce,—, 105 Atl. 417; 13 Neg. Cas. 315 (note, 315 to 333).

The general character of the testimony on the question of dependency is sufficiently shown in the opinion of the court.

PER CURIAM. [1] While the case before the court is very much like the case of Shaw Co. v. Palmatory, 7 Boyce, —, 105 Atl. 417, in its facts, we think there is sufficient dissimilarity to distinguish the one from the other.

In the Palmatory Case, in which the board found there was dependency, the testimony on material points was reasonably definite and clear, while in the present case it is exceedingly vague and uncertain. It does not appear how much the father made in his business, or why he did not contribute more to the support of his family. While it was shown that practically all of the son's wages were given to his mother it is not clear that any part was required or used for the actual support of his father and mother. The son was living at home and we do not know how much of his income was used for his own requirements, viz. for board, clothing, insurance and other expenditures. There was really no proof of dependency except the assertion of the father and mother, uncorroborated by any other testimony, or any facts or circumstances from which the board could be clearly satisfied there was dependency.

Against the testimony that was given by the father, mother, and sister to show dependency, we have certain facts which strongly indicate there was no dependency within the meaning of the law, viz.:

The father is in the prime of life, 42 years of age, in good health, and able to follow his occupation all the time; the mother is also well and strong, and the sister making her own living away from home, receiving $120 per month, and contributing nothing to the support of her parents. Presumably they were in no wise dependent on her wages. But the conclusion of the court in the present case can be reconciled with the decision in the Palmatory Case on another and more important ground.

[2, 3] We cannot agree with the contention made by counsel for the employer, that—

"If the board found as a fact that dependency did not exist this court cannot review or reverse the finding of fact thus made."

The question of dependency is not entirely one of fact. But we do think that where the board has found and determined that dependency did not exist this court should not reverse that finding unless it clearly appears that under the testimony it could not be reasonably made. This court should be as slow to reverse a decision of the Industrial Accident Board as it is to set aside the verdict of a jury in a civil cause. The verdict of a jury is never set aside, as being against the evidence, if there was any testimony which would reasonably warrant the verdict. Such is the rule the court uniformly follows, and we think a rule equally as strong should be adopted in appeals from the Industrial Accident Board. Applying such a test it is manifest that the court was right in affirming the decision of the board in the Palmatory Case, and would be right in affirming the finding in the present case. It must be admitted that both were close cases on the facts, difficult for the court to decide with only the record before them, and under such circumstances the court should refuse to reverse the action of the board, who had the witnesses before them, just as they would refuse to set aside the verdict of a jury in a similar case.

The award of the board is affirmed, and the costs of the appeal are awarded and taxed against the appellees.

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COLBOURN v. NICHOLS.

(Superior Court of Delaware. New Castle. March 20, 1920.)

109 Atlantic Reporter 882.

1. MASTER AND SERVANT—TEAMSTER EMPLOYING MORE THAN FIVE WITHIN COMPENSATION ACT THOUGH ALL SERVANTS DID NOT ACT IN CONJUNCTION.

A teamster employing more than five persons in his business comes within the Workmen's Compensation Act, providing in section 141 that it shall not apply to employers or employees in any employment in which less than five persons are employed, notwithstanding all of the teamster's employees were not working at the same job but worked on various different jobs.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT—EMPLOYEE OF TEAMSTER RIDING ON ELEVATOR IN GETTING LOAD WAS WITHIN HIS SERVICE.

Where the driver of a truck and deceased, both employees of a teamster who was engaged in general hauling business, went to haul goods packed in boxes for delivery to a railroad station, and after they had loaded those on the platform entered a building and used the elevator to move goods from above, deceased, who was riding on the elevator when killed, was within the teamster's service under Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

3. MASTER AND SERVANT—EMPLOYEE OF TEAMSTER RIDING ON FREIGHT ELEVATOR HELD NOT TO HAVE SHOWN DELIBERATE INDIFFERENCE.

An employee of a teamster who was riding on boxes piled on a freight elevator which were to be transported cannot, where the elevator was safe and had the boxes been properly loaded he would not have been injured, be deemed to have shown a deliberate and reckless indifference to danger which would bar recovery under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

Conrad and Heisel, JJ., sitting.

Daniel O. Hastings, of Wilmington, for appellant.
Horace G. Eastburn, of Wilmington, for appellee.

Proceedings under the Workmen's Compensation Act (29 Del. Laws, c. 233) before the Industrial Accident Board, by Mary E. Nichols, widow, to obtain compensation for the death of Rennie E. Nichols, her husband, against Charles H. Colbourn, employer of Rennie E. Nichols at the time of his death. The Board awarded compensation to the claimant. The employer appeals. Award sustained.

The employer was in the general hauling business, and at the time of the accident, he had in his employment not less than seven men. One of these, the driver of a truck, and Nichols, the deceased, went to the building of Topkis Brothers, at Third and French Streets, in the city of Wilmington to get goods packed in boxes for delivery to the railroad station. On reaching the building of Topkis Bros., the goods, which were down on the platform at the building were loaded on the truck, and then Nichols

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went up on the elevator with the operator to the top floor of the building and assisited in loading boxes on the elevator, and when it was loaded, he got on the boxes in the elevator, which on its way down soon suddenly stopped between floors. Nichols was found dead between the boxes and the top of the elevator.

Under the statute and rule of court, the appeal was heard by the Superior Court for New Castle County, on the record of the proceedings before the Industrial Accident Board.

The ground of the appeal was that Rennie E. Nichols, the deceased husband of the claimant, was not killed in the line of his duty or the performance of any act incidental thereto, and that the employer is not bound by the provisions of the Delaware Workmen's Compensation Act. The Industrial Accident Board awarded to the claimant reasonable burial expenses, not exceeding one hundred dollars, and the sum of three dollars and seventy-five cents per week, beginning March 19, 1918, until modified or terminated under the provisions of "The Delaware Workmen's Compensation Law of 1917."

Section 141 of said act (Code, § 3193vv), 29 Del. Laws, 790, provides:

"This article shall not apply to farm laborers, domestic servants, officers and servants of the State, or any governmental agency created by it, nor to their respective employers; nor to the employers or employees in any employment in which less than five persons are employed."

At the hearing in the appeal, the first question raised in behalf of the Employer was:

" Doesn't the Act * * * apply only to employers who employ more than five persons in one employment and located in one place?'

And the contention was made that where an employer is engaged in general hauling and has two men on each truck or wagon, as shown by the testimony in this case, each truck or wagon with its crew constitutes separate and dinstinct employments. It was further urged that the evidence shows that the husband of the claimant was not, at the time he was killed, engaged "in or about his employer's business where his services required his presence as a part of such services at the time of the injury," and that if the claimant is entitled to compensation it is because her husband was at the time of the injury "engaged elsewhere in or about his employer's business where his services require his presence as a part of such service at the time," etc. Section 138a (Code, § 3193ss), 29 Del. Laws, 789.

It was insisted that there was no evidence that the employer instructed his men to go to the top floor of the building in which the accident occurred to bring down goods on an elevator and that the most that can be said for the claimant is that the employees did sometimes do so with the knowledge and consent of the employer. It was further claimed that the death of the claimant's husband was the result of "his deliberate and reckless indifference to danger" within the purview of section 129 (Code, § 3193jj), 29 Del. Laws, 786.

For the claimant it was urged that the act applies to any employment in which five or more persons are employed, working for the employer in the particular employment, whether on the same job or on different jobs. That it is the general employment, and not the subdivisions thereof, which is contemplated by the Statute.

That while the evidence was conflicting on the point that the deceased was not engaged in the service of his employer when he was killed, yet, there was enough to warrant the finding of the Board, and especially so in view of the evidence tending to show that the employer knew and consented that the deceased at times helped to bring the goods from the building to the platform.

That it seems obvious that the deceased did not manifest, at the time of the accident, a "deliberate and reckless indifference to danger"; for

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the elevator was in good condition, and a person could have safely come down on top of the boxes, if properly loaded, and there is nothing to indicate, much less show, that the deceased was aware that the boxes had not been properly loaded on the elevator.

CONRAD, J., delivering the opinion of the Court:

[1] The Court finds no error in the first contention made by appellant's counsel, viz., that there were less than five persons engaged in the same employment at the time of the accident. The appellant was a teamster and by the evidence it clearly appears that he had more than five persons in his employ, although all of his employes were not at the time of the accident working at the same job. The Statute contemplates a general employment, and not the subdivisions thereof.

[2] The Court is satisfied that the deceased at the time of the accident was clearly engaged in the service of his employer. Sufficient evidence appears in the case to have warranted the Board in finding that the deceased was killed when engaged in a work in a way and at a place that had been suggested by his employer. So in that finding to that effect is approved.

[3] The evidence shows that the death of the deceased resulted from the improper or unskillful loading of the boxes on the elevator, but the deceased when he took a place on top of the boxes was seemingly unaware of that fact, and did not by so doing show "a deliberate and reckless indifference to danger." The elevator seems to have been in good order and if the boxes had been properly loaded, was not dangerous and a person could with safety have ridden on top of them.

The finding of the Board is affirmed.

CITY OF CHICAGO v. INDUSTRIAL COMMISSION et al (No. 13153.)

(Supreme Court of Illinois. April 21, 1920. Rehearing Denied June 3, 1920.)

127 Northeastern Reporter 351.

MASTER AND SERVANT—CITY FIREMEN HELD NOT "EMPLOYE" WITHIN COMPENSATION ACT.

Battalion chief of Chicago fire department until whose death it could not be determined that he would not leave a widow or minor children, beneficiaries or heirs to whom pension would be payable from firemen's pension fund, to which city contibuted, *held* not an "employe" within Workmen's Compensation Act as amended by Laws 1915, p. 400, though he died leaving no one surviving entitled to receive a pension under Firemen's Pension Fund Act, § 6.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Carter, J., dissenting.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Helen Lacey for compensation for the death of her father, Martin Lacey, opposed by the City of Chicago, the employer. Compensation was awarded by the Industrial Commission, the award affirmed by the circuit court, and

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the City brings error. Judgment of the circuit court reversed, and award of Industrial Commission set aside.

Samuel A. Ettelson, Corp. Counsel, and William H. Devenish, City Atty., both of Chicago (Robert H. Farrell, of Chicago, of Counsel), for plaintiff in error.

Vent & Warfield, of Chicago (Thomas G. Vent, of Chicago, of counsel), for defendant in error.

THOMPSON, J. The writ of error is prosecuted, by leave of court, to review a judgment of the circuit court of Cook county affirming a decision of the Industrial Commission awarding compensation to defendant in error for the accidental death of her father, Martin Lacey.

Martin Lacey, deceased, was employed in the city of Chicago as a battalion chief in its fire department. November 8, 1916, while responding to an alarm of fire, deceased met with an accident resulting in his death. At the time of his death his salary was $3,000 per annum. During all of the time that deceased was a member of the fire department the city of Chicago maintained and distributed a pension fund in the manner provided by law, and the deceased contributed his full share to said pension fund. At the time of his death he left surviving him as his only heir at law and next of kin his daughter, Helen Lacey, 31 years of age, whom he supported up to the time of his death, and who was dependent upon him for support.

The only question presented for decision is whether or not deceased was an employe of the city of Chicago within the meaning of the Workmen's Compensation Act as amended in 1915. Section 5 of the act provided:

"The term 'employe' as used in this act shall be construed to mean: First—Every person in the service of the state, county, city, * * * under appointment, or contract of hire, express or implied, oral or written, * * * except any employe thereof for whose accidental injury or death arising out of and in the course of his employment compensation or a pension shall be payable to him, his personal representatives, beneficiaries or heirs, from any pension or benefit fund to which the state, or any county, city, * * * or municipal corporation therein contributed in whole or in part." Laws of 1913, p. 340.

Section 5 of the Firemen's Pension Fund Act provides for compensation to the fireman in case he becomes disabled, and section 7 provides for his compensation in case he is retired. Section 6 of said act provides:

"If any fireman shall die from any cause while in the fire service or during retirement after twenty years' service, as hereinafter provided, and shall leave a widow, minor natural child or children under sixteen years of age, or dependent natural father or mother surviving, said board of trustees shall direct the payment from such pension fund of the following sums monthly." Laws of 1915, p. 295.

It will be seen, therefore, that under the provisions of section 5 of the Workmen's Compensation Act the deceased would not have been, during his lifetime, entitled to receive compensation. Up until the very time of his death he was excepted from the provisions of the Compensation Act because by the provisions of sections 5 and 7 of the Pension Act he was entitled to compensation, and by the provisions of section 6 of the Pension Act his widow or minor children were entitled to compensation. Until his death it was not possible to determine that he would not be survived by a widow or minor children, and so it was not possible to determine until after his death that he would not leave surviving him "beneficiaries or heirs" to whom a pension would be payable from a fund to which the city had contributed. Whether or not a person

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is an employe within the meaning of the Workmen's Compensation Act must be determined from the situation existing during his lifetime. If during his lifetime deceased was not an employe of the city of Chicago within the meaning of the Workmen's Compensation Act, and not entitled to receive compensation under its terms, he cannot become an employe after his death. The fact that deceased died leaving no one surviving entitled to receive a pension under the Firemen's Pension Fund Act, could not, ipso facto, after his death bring the deceased with the provisions of the act from which he was excluded during his lifetime.

The award of the Industrial Commission was erroneous, and should have been set aside by the circuit court. The judgment of the circuit court is therefore reversed, and the award of the Industrial Commission set aside.

Judgment reversed.

Carter, J., dissenting.

O'BRIEN v. CHICAGO CITY RY. CO. et al. (No. 13218.)

(Supreme Court of Illinois. April 21, 1920. Rehearing Denied June 3, 1920.)

127 Northeastern Reporter 389.

3. MASTER AND SERVANT—DECLARATION BY CITY EMPLOYE AGAINST STREET RAILROAD HELD NOT UNDER COMPENSATION ACT .

A declaration for injuries to a city employee against a street railroad, whose car struck him, states a common-law action for damages, not an action under the Workmen's Compensation Act, which relates to the relation of master and servant, and an allegation in the declaration that defendant had elected not to come under the Compensation Act was surplusage.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

4. MASTER AND SERVANT—CITY EMPLOYE NOT PRESUMED WITHIN COMPENSATION ACT.

Since a city is engaged in work, some of which is classed as hazardous under Compensation Act. and some of which is nonharzardous, there is no presumption that an employe who was injured was subject to that act.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; John J. Sullivan, Judge.

Action by Owen O'Brien against the Chicago City Railway Company and others. A judgment for the plaintiff was reversed, without remand by the Appellate Court, and plaintiff appeals. Judgment of Appellate Court reversed, and cause remanded to that court, with directions to pass on assignments of error not passed on by it.

James C. McShane, of Chicago, for appellant.

Charles Le Roy Brown, of Chicago (John R. Guilliams and John E. Kehoe, both of Chicago, of counsel), for appellees.

STONE, J. The appellant filed his declaration in the superior court of Cook county, charging the appellees with negligently injuring him while he was engaged in his work as an employe of the city of Chicago, at

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the corner of Ashland avenue and Thirty-seventh street, in said city. The declaration consisted of two counts, which charge the defendants with owning and operating a street railway, and that by the negligence of the motorman in charge of one of the defendants' cars the plaintiff, while engaged in his work for the city, was struck and injured. A hearing was had before a jury and a verdict was returned in the sum of $12,500. Motions for new trial and in arrest of judgment were overruled and judgment entered thereon against the defendants. The cause was appealed to the Appellant Court, where the judgment was reversed without remanding, on the ground that the declaration did not state a cause of action—it being there held that the declaration showed that the suit was brought under the second clause of section 29 of the Workmen's Compensation Act (Laws 1913, p. 354); that therefore it should have alleged that the injury in question was not proximately caused by the negligence of plaintiff's employer, the city of Chicago; that since no cause of action was stated in the declaration, and it appearing that the time for bringing the action had expired, it would be useless to reverse the judgment and remand the cause, and therefore the judgment was reversed without remanding.

While it was not so charged in the declaration, it appeared from the evidence that appellant and his employer, the city of Chicago, were operating under the Workmen's Compensation Act as to the employment in which appellant was engaged. It also appeared in evidence that the defendants had elected not to be bound by the Workmen's Compensation Act, and an averment to that effect was contained in each count of the plaintiff's declaration.

It is contended by appellant that the declaration stated an action for negligence at common law, and that the declaration did not contain averments touching the question whether or not the plaintiff and his employer were operating under the Workmen's Compensation Act, and that the question as to the requirements of a declaration under the Workmen's Compensation Act did not, therefore, arise, and the averment relating to the defendants having elected not to be bound by the Workmen's Compensation Act was surplusage. Appellees contend that, even if this be so, the cause must be remanded to the superior court for new trial by reason of the improper admission in evidence of a certain contract between the appellant and the city of Chicago, and by reason, also, of an error in giving the appellant's fifth instruction.

[1, 2] The first question to be passed upon in this case is whether or not the declaration of appellant stated a cause of action. Counsel on both sides have made extended arguments on the question as to whether or not the appellant's declaration brought his case under the second clause of section 29 of the Workmen's Compensation Act. It also appears that on the trial counsel for appellant, as well as for appellee, proceeded on the theory that the Compensation Act affected the rights of the parties. Neither the evidence introduced nor the arguments made on the trial or here are the test whether the declaration states a cause of action, but that question is to be determined from the language of the declaration itself, without reference to the evidence or the arguments of counsel. American Car Co. v. Hill, 226 Ill. 227, 80 N. E. 784. The Appellate Court found that the declaration attempted to state a cause of action under the second clause of section 29 of the Workmen's Compensation Act, and held that it did not state a good cause of action under such act, and reversed the judgment without remanding. In the trial court appellees here entered a motion in arrest of judgment, which was overruled. The sufficiency of the declaration may be reached on motion in arrest of judgment. The issue under such motion is the sufficiency of the declaration.

The declaration as originally filed consisted of one count. It averred that on the date of the injury, and prior thereto, both defendants, the Chicago City Railway Company and the Chicago Railways Company,

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were operating a street railway owned and possessed by the Chicago City Railway Company, which street railway extended upon and along South Ashland avenue, in the city of Chicago; that plaintiff was employed by the city of Chicago upon South Ashland avenue, at or near the intersection of that avenue and West Thirty-Seventh place; that while the plaintiff, as such employe of said city of Chicago, was engaged in its said work, and was then and there in and upon said South Ashland avenue at or near said street intersection, and so close to said railway that he was liable to and likely to be struck and injured in the event said street car should be operated southward upon and along said railway, up to and past said place where plaintiff was, without due and timely notice and warning to the plaintiff, all of which facts the plaintiff alleges that the defendants' motorman who was in charge of the operation and management of said car then knew or by the exercise of ordinary care would have known, yet the plaintiff alleges that while he was so at said place and engaged in said work, and was exercising ordinary care for his own safety, the defendants, through their motorman, wrongfully and negligently ran the street car past said place at a high and dangerous rate of speed and without notice or warning to the plaintiff, and that he was struck and injured by said car. The declaration then in one of its closing paragraphs avers:

"Plaintiff further alleges that both said defendants, long prior to the time of plaintiff's injuries, duly and effectively elected not to be bound by the provisions of the Illinois Workmen's Compensation Act, and neither of them were bound by said act at said time."

A plea of the general issue was filed to the declaration by the defendants. Later, on leave of court, an additional count was filed. The count alleges, after averring ownership of the instrumentalities of the defendants, that at the time and place alleged in the original count—

"plaintiff was employed by the city of Chicago in and about certain work then being performed by said city in and upon said South Ashland avenue, at or near said street intersection."

The count further avers that while the plaintiff, as such employe of said city, was engaged in its work and was then and there in and upon said street intersection, and so close to said railway that he was liable and likely to be struck and injured in the event said street car should be operated southward upon and along said railway up to and past said place where the plaintiff was, without due and timely notice and warning to plaintiff, all of which facts defendants then and there knew or might have known, the plaintiff was struck and injured by said street car, which was being run at a high and dangerous rate of speed and without warning to the plaintiff. The further averments of this additional count, except those alleging the extent of plaintiff's injuries, are practically identical with the original count. This count likewise in one of its closing paragraphs alleges that the defendants had elected not to be bound by the Workmen's Compensation Law. The plea of general issue was filed to this additional count.

[3] There is nothing in either count of the declaration that in any way amounts to an averment that the plaintiff or his employer, the city of Chicago, was operating under the Workmen's Compensation Act. With the exception of the statement that the defendants had elected not to be bound by the Workmen's Compensation Act the declaration is a plain common-law declaration for negligence. In the absence of an averment that the plaintiff or his employer was in any way affected by the Workmen's Compensation Act, the statement in the declaration that the defendants had elected not to be bound by the act was wholly and immaterial averment and should be treated as surplusage, and evidence thereunder was immaterial to the issues raised by the declaration. The declaration contained no averment as to the nature of plaintiff's employment.

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[4] The Workmen's Compensation Act was designed to affect the relation of master and servant. Only those employers and employes who have elected to be bound by the act, or who by reason of occupation are presumed, in the absence of an election to the contrary, to have so elected, are affected thereby. Gones v. Fisher, 286 Ill. 606, 122 N. E. 95. If the declaration contains averments from which it may be concluded that the plaintiff and his employer are under the act, as where the averments of employment are such as to presumptively show them to be under the act, the declaration will be construed as averring that the plaintiff and his employer are bound by the act. In the absence of any averments amounting to such a statement, courts cannot take judicial notice that the plaintiff and his employer were so bound. When the declaration contains no averment which will bring the plaintiff under the Workmen's Compensation Act, that act has nothing to do with the case so far as the same is presented by the declaration. Here the declaration averred that plaintiff was employed by the city of Chicago. A city may engage in occupations which will bring it under the Workmen's Compensation Act as to such occupations. It may and does likewise engage in occupations that are not under the act. The mere fact that an employer may in some departments of his business be engaged in a hazardous occupation will not, in the absence of averments as to what the nature of the particular occupation is, raise a presumption that plaintiff was engaged in hazardous work, where the employer likewise engages in a business or an occupation that is not hazardous. Mepham & Co. v. Industrial Com., 289 Ill. 484, 134 N. E. 540.

The statement that the plaintiff was employed by the city of Chicago did not constitute an averment that the plaintiff and his employer were under the Workmen's Compensation Act. There is therefore no averment which makes the Workmen's Compensation Act applicable in the suit of plaintiff against the defendants, but the declaration is for negligence at common law. If the declaration does not show that the plaintiff is bound by the act, the averment that the defendants had elected not to be bound thereby does not make the case one brought under the act. Such an averment was immaterial and mere surplusage, and plaintiff had no right to make proof under it. Plaintiff's declaration presented a good cause of action at common law and not under the Workmen's Compensation Act, and the Appellate Court erred in construing the declaration as a declaration drawn under section 29 of said act. It was therefore error on the part of the Appellate Court to reverse the judgment without remanding.

[5] While many errors were assigned in the Appellate Court, the only other error passed upon by that court was as to the admission in evidence of a certain written contract between appellant and the city of Chicago, known as "Plaintiff's Exhibit G." This was an agreement in writing between appellant and the city of Chicago, by its attorney, which, after reciting the circumstances of the occurrence of the injury and that appellant had commenced his suit against the defendants, purports to give the consent of the city to said suit and to assign to appellant any claim against the appellees which the city might have. This contract gave the appearance of sanction by the city to the action begun by appellant, and was clearly incompetent and prejudicial to defendants, and it was error to admit it in evidence. For this error the cause should have been remanded for retrial.

[6] Appellant's fifth instruction, so far as complained of, was as follows:

"You are instructed that the fact, if it be a fact, that plaintiff's foreman was guilty of negligence which contributed to his injury, is no defense to this suit, provided you further find from the evidence that plaintiff did not in any manner cause, induce, or contribute to said negligence, if any, on the part of said foreman."

Under the case made by the declaration, defendants had a right

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to the benefit of any facts and circumstances that would tend to show that the negligence of others, and not their negligence, was the proximate cause of the injury. This instruction deprived them of that right, and the giving of it constituted reversible error.

While numerous other assignments of error were made in the Appellate Court by appellees here, who were appellants in that court, they are not before us for review.

For the error of the Appellate Court herein referred to, the judgment of the Appellate Court will be reversed, and the cause remanded to that court, with directions to pass upon the assignments of error not passed upon by it.

Reversed and remanded.

IN RE DUNCAN. (No. 10810.)

(Appellate Court of Indiana, Division No. 2. May 11 1920.)

127 Northeastern Reporter 289.

1. MASTER AND SERVANT—COMPENSATION ACT LIBERALLY CONSTRUED.

The Workmen's Compensation Act being remedial in character and and intended to cure defects existing in the former laws, should be liberally construed to carry into effect the legislative purpose, even to the inclusion of cases within the reason, though outside the letter, of the statute.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

2. MASTER AND SERVANT—PURPOSE OF COMPENSATION ACT DEFINED.

The purpose of the Workmen's Compensation Act is to compel industries to bear the loss and burden of industrial accidents, rather than that such loss shall be borne by the workmen themselves, their dependents, or the state at large.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

3. MASTER AND SERVANT—SHOT FIRER SELECTED BY MINERS HELD WITHIN COMPENSATION ACT; "EMPLOYE."

A shot firer in a coal mine selected by the miners, who were all members of a union and from whose compensation per ton a small amount was deducted and paid over to the union, which paid the shot firer, as Burns' Ann. St. 1914, § 8610, provides, though its provisions were not considered when the arrangement was made, *held* an employe of the mine operator, and as such entitled to compensation under Workmen's Compensation Act, § 76.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Claim by Frank Duncan for compensation under the Worwkmen's Compensation Act against the Grant Coal & Mining Company. On questions certified by the Industrial Board. Questions answered, and claimant held an employe.

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McMAHAN, J. The Industrial Board has certified the following statement of facts to this court:

The Grant Coal & Mining Company on July 11, 1919, and for many years prior thereto, was engaged in the business of mining, selling, and shipping coal from a mine in Vigo county, Ind., known as the Grant mine, and employed in its said business approximately 400 men. The coal in said mine cannot be mined easily or profitably with a pick without first being blasted. For the purpose of blasting the coal, holes are drilled into the face thereof. These holes are then charged with powder and tamped, with fuses extending from the charge back to the mouth of the hole. These fuses, being ignited burn up to the charge, when an explosion takes place and loosens the coal, so that it may be shoveled into the cars. This work constitutes a necessary part of the mining of the coal. In practical mining the fuses may be lighted either by the miner loading the coal or by a shot firer selected for that purpose. In a mine like the Grant mine, where many miners are employed, it is safer both for the property of the mine owner and the persons of the miners to have the fuses lighted, or the shots fired, by a regular shot firer after the miners have left the mine.

July 11, 1919, and at all other times mentioned herein, the Grant mine was a union mine, that is, all the miners employed therein were members of "Local Union 953," which was a constituent part of the United Mine Workers of America, District No. 11, and during all of said time the Grant Coal & Mining Company was a member of the Indiana Bituminous Coal Operators Association. May 19, 1916, the Indiana Bituminous Coal Operators Association and District No. 11, United Mine Workers of America, entered into a wage agreement, effective April 1, 1916, to March 31, 1918, and which was continued in force by the mutual agreement of said association and United Mine Workers for a period of two years from April 1, 1918. The Grant Coal & Mining Company and the miners employed therein were, on July 11, 1919, operating under said agreement. In said agreement a specific price per ton was fixed for mining coal, and it was stipulated in said agreement that—

"The price per ton for mining herein agreed to for pick and machine work, shall include all labor necessary to cut the coal, drill, blast the same, load it on the miner's car and properly care for and timber the miner's working place, and that no division of the scale shall carry any exception to this rule."

An agreement or understanding was entered into between the Grant Coal & Mining Company, and the miners employed therein, whereby said miners were to select a person as shot firer to do the shooting or blasting for them. Pursuant to said agreement or understanding, said shot firer was to be selected by the miners employed therein, and was to be absolutely under their control and subject to their discharge and order. Pursuant to said arrangement, said Local Union No. 953, including the miners working in said Grant mine, selected Frank Duncan as the shot firer to fire the shots in said mine. On July 11, 1919, and for a long time prior thereto, said Duncan had been doing the shooting, firing, and blasting in said mine with the knowledge and consent of the Grant Coal & Mining Company. Under an arrangement between the miners employed in said mine and said Grant Coal & Mining Company, Frank Duncan was paid for his services as shot firer in said mine by and through a device by which the company separated the agreed per ton price for mining the coal, paying part of it directly to the miners, and an amount equal to the compensation of said Frank Duncan to the financial secretary of Local Union 953, to be paid by him to said Frank Duncan for his services as shot firer. The amount paid to the miners directly by the Grant Coal & Mining Company and the amount paid to said financial secretary equaled the per ton price for mining coal as

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agreed upon in the wage contract of May 19, 1916, and it required both of said amounts to equal the per ton price as specified in said contract. In other words, the Grant Coal & Mining Company did not pay to individual miners the full sum per ton fixed in said wage agreement, but paid to them a certain portion thereof, and to the financial secretary of Local Union 953 the remainder thereof, to be by him paid to said Frank Duncan for his services as shot firer. The average weekly wages of said Duncan as shot firer was $24. On July 11, 1919, while engaged in firing shots in said mine, Frank Duncan received a personal injury by reason of an explosion arising out of and in the course of his said work, which resulted in such disability as will entitle him to an award of compensation against the Grant Coal & Mining Company at the rate of $13.20 per week if he in fact was at the time of such injury an employe of said company. He has filed a claim for compensation under the Workmen's Compensation Act. This claim is resisted by the Grant Coal & Mining Company upon the sole and only ground that at the time of receiving his injury he was not in its employ.

Upon the foregoing facts the Industrial Board by virtue of section 61 of the Workmen's Compensation Act (Laws 1915, c. 106) has submitted the following questions of law for our determination:

(1) Would a finding that Frank Duncan was an employe of the Grant Coal & Mining Company at the time of his injury be sustained by sufficient evidence?

(2) Would such a finding be according to law?

[1] The Workmen's Compensation Act sought the correction of recognized errors and abuses by introducing new regulations for the advancement of the public welfare. Being remedial in character, it should be construed with regard to former laws and the defects or evils to be corrected and the remedy provided. It should be liberally construed to the end that the purpose of the Legislature, by suppressing the mischiefs and advancing the remedy, be promoted, even to the inclusion of cases within the reason although outside the letter of the statute. 36 Cyc. 1175.

[2, 3] Prior to the enactment of the Workmen's Compensation Act, the consequential and financial losses to workmen engaged in industrial activities were borne by the workmen themselves, by their dependents, or by the state at large. The Legislature by the passage of this act indicated its belief that this loss should be borne by the industries causing them, or more accurately by the consumers of the products of the industry causing the loss.

The Supreme Court of Ohio, in speaking upon this subject, said:

"The theory upon which the compensation law is based (which is now generally accepted) is that each time an employe is killed or injured there is an economic loss which must be made up or compensated in some way, that most accidents are attributable to the inherent risk of employment—that is, no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than by society as a whole, that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs to compensate the persons injured, or his dependents, for his or their loss." State v. Industrial Com., 92 Ohio St. 434, 111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162.

See, also, McRoberts v. National Zinc Co., 93 Kan. 364, 144 Pac. 247; Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann Cas. 1915B, 847; Louis, etc., County v. Industrial Acc. Bd., 52 Mont. 6, 155 Pac. 268, L. R. A. 1916D, 628; Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358 Ann. Cas. 1915D, 154.

The facts as certified by the board are almost identical with the facts in the case of Bidwell Coal Co. v. Davidson (Iowa) 174 N. W. 592. There, as here, the agreement was to pay a fixed price per ton for the coal mined. The miners had the right to select and discharge the shot

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firer. The mining company deducted from the per ton price a sum sufficient to pay the shot firer. It was there held that the shot firer was an employe of the mining company. The reasoning of the court in that case is so applicable to the facts now under consideration that we can do no better than to adopt the same. In discussing the question, the court said:

"This company was engaged in mining coal for the market. Its business was to get this coal out of the ground and upon the market. To this end it employed men to bring the coal from the ground that the company might place it upon the market. Every act in the mine in the way of getting this coal to the surface of the ground was done in the service of the company, and to effectuate the purpose for which the company was organized, and to make profitable to the company the work it had undertaken. The boring of these holes in the face of the mine, preparing the blast, and tamping the hole was all work done in furtherance of that purpose. The examining and the firing were all done with one end in view, to wit, to secure coal for the market. Had the miner who bored the hole charged it with powder and tamped it, lit the fuse to the blast, he would be clearly in the line of his employment, and clearly working as an employe in the service of the company. If he was injured or killed while so engaged, compensation should be made under the Workmen's Compensation Act. However, the company delegated to the miners the right to select one man to discharge this specific duty. This duty, when discharged, was dischargel in the interests of the company. The agreement between the company and the miners was that the miners might designate or select a person to do this firing instead of doing it themselves. The company was not willing, however, to pay the miner the full amount per ton which he was entitled to under his contract, unless he did the firing, which was a part of that work. It was not willing to pay the miner the full price for mining a ton while another was employed and paid for doing a part of the work. So it was agreed that the company should deduct a sum per ton from what it had agreed to pay per ton for the completed work, and pay this to the one who did this part of the work. The miners and the company agreed that this sum should be paid by the company to the man who did this particular work for the company.

"So we find that the shot firer was in fact paid by the company. In the bookkeeping of the company it would appear that the full sum per ton agreed to be paid was allowed to the miner for mining the coal, and that the miner, out of this sum, paid the shot firer. That, however, is a mere matter of bookkeeping. The real purpose and intent of the agreement was that the miner should not receive the full price per ton for mining, while another was doing part of the work essential to be done in order to procure the ton for which the compensation was allowable; that the company should pay to the one who did part of the work a portion of the sum which it had agreed to pay per ton for mining the coal.

"It is next contended that the deceased was not an employe of the defendant, for the reason that he was not under the control of the company; that he was employed by, and the power to discharge him rested in, the miners themselves, and not in the company. It is true, as a general proposition, and we think the record shows it was so understood in conferences between the miners and the company, that the management of the mine and the direction of the mine are vested exclusively in the operators of the mine, and that the miners have no right to abridge this right. The selection of a shot firer was given by the company to the miners in the mine, and it is said that whenever a majority of the miners in any mine decide to do so, they may select the shot firer for the mine. That is, the company, having authority to select its own employes, delegated to the miners the right to select certain persons to do certain work in the mine. The work to be done in the mine was for the use and benefit of the mine owners. The power to select the workmen rests originally and primarily in the owners. They may delegate that right to select to

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another. The selection made under this delegated power is the selection of the mine operators themselves. Ordinarily, the mine owners have a right to control the action of their employes and discharge them if thought proper. The law gives them this right. They may delegate to the miners themselves a right to select the shot firer. The miners are peculiarly interested in this selection. They are in a position to judge of the character or the man employed. Their work and their personal safety are involved in the selection. They designate a person. The person designated is satisfactory to the operators of the mine, and they consent that the person selected perform this work in the mine. The work is performed for the company, in the interests of the company, and for the advancement of the very purpose of which the company is organized. The company may delegate the right to supervise the person selected, and the right to discharge him whenever his conduct imperils the safety of the miners. In this, too, the miners act under delegated power from the owner. When the company delegates this power to the miners and they act, make the selection, the act of selecting becomes the act of the mine owners themselves. We think here the most that can be said of the arrangement between the miners and the operators was that the operators had delegated this right to the miners.

"This thing is clear: This man was working in the mine, doing work for the company in the mine, with the knowledge and consent of the company, and for the purpose of more effectually carrying on the work in which the operators were engaged. He was engaged at the time he was injured in performing an indispensable part of the mining operations carried on in the mine. He was doing a part of the business of mining for which miners were directly employed. The appellant knew that he was doing this work for them. If he had been employed directly by the company as shot firer, the liability of the company would be apparent under the Workmen's Compensation Act. The fact that they had delegated to the miners the right to select him to do this particular work, indispensable to a proper carrying on of the work, does not change the relationship."

We are not without authority in this state for holding that a shot firer who is hired by the miners, as was Frank Duncan, is an employe of the mining company, and authorized to maintain an action for damages on account of injuries sustained by him in the course of his employment. Princeton Coal, etc., Co. v. Downer, 48 Ind. App. 136, 93 N. E. 1009. See, also, Princeton, etc., Coal Co. v. Lawrence, 176 Ind. 469, 95 N. E. 423, 96 N. E. 387, where the question is discussed, but not decided. The court in this case, after referring to the allegations of the complaint relative to the duties of the shot firer and the method of paying him, at page 480 of 176 Ind., 95 N. E. 427, said:

"Fairly construed, this means that appellant consented to and approved the selection made by the miners, but in any event these shot firers were not mere licensees, and it is not necessary that we should determine whether they were servants of appellant. They were in the mine pursuant to the express provisions of a statute. It was more than an invitation to be there. They were there engaged in business for the operator, not in their own business, except as their business was that of assisting in mining coal, in carrying out a distinct part of the business of the operator, with its knowledge and consent, and we see no difference between the duty owing to them in regard to sprinkling the mine than that owing to the miners proper. The law was enacted for the benefit of all persons whose work requires them to be in the mines, in and about the business of the operator in coal mining, whether or not the strict relation of master and servant existed between appellant and appellee's decedent."

See, also, Rummell v. Dilworth, etc., Co., 111 Pa. 343, 2 Atl. 355; Tennessee Coal, etc., Co. v. Hayes, 97 Ala. 201, 12 South. 98; Haluptzok v. Gt. Northern R. Co. 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 729;

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Pugmire v. Oregon R. Co., 33 Utah, 27, 92 Pac. 762; Tex., etc., R. Co. v. Parsons (Tex. Civ. App.) 109 S. W. 240.

In Ringue v. Oregon Coal, etc., Co., 44 Or. 407, 75 Pac. 703, the appellant was assisting his father, who was working in appellee's mine, mining coal at a fixed price per ton. While engaged in that work appellant received an injury and sued for damages. The trial court instructed the jury to the effect that appellant's right to recover depended upon his employment by the coal company, and that he was not entitled to recover unless there was an actual contract of employment, even though he may have been working in the mine at the request of his father with the mining company's permission and consent, and for its benefit. The court in discussing these instructions held that the burden of proof was upon the appellant to show such a state of facts as under the law of negligence would constitute the relation of master and servant, and said:

"We do not understand, however, that it was necessary for him to prove a direct contract by some authorized agent of the defendant employing him, or that his right to work was included in the terms of the contract with his father. If, as the evidence tended to show, he was going into the mine at the time of the accident by the request of his father, with the permission or consent of the defendant, express or implied, for the purpose of performing work or labor for it, he was not a trespasser or a licensee, but was rightfully in the mine, and the relation of master and servant existed between him and the defendant, within the meaning of the rule requiring a master to exercise reasonable care to prevent injury to his employes."

In Tennessee, etc., R. Co. v. Hayes, supra, the railroad company had employed Randall Hayes, father of appellee, to load coke into cars, paying him so much per car. The appellee was assisting his father in this work, and while so doing he received an injury. Randall Hayes was under the control and direction of the company's superintendent or foreman, who had authorized the elder Hayes to bring appellee along with him and put him on the work. A man by the name of Ried and his son were also employed by the railroad company to load cars, and received so much for each car loaded. They were loading a car near where appellee was working, and through their negligence appellee received an injury. The court in holding the railroad company liable for damages said:

"Not only is the defendant liable for injuries caused by the negligence of the Rieds in moving the car upon which they were engaged, but, in our opinion, that liability may be enforced by the plaintiff under section 2590 of the Code, known as the Employers' Liability Act, under one aspect of the evidence as to the relation existing between plaintiff and the defendant."

Most of these cases were decided prior to the adoption of a Workmen's Compensation Law, or at least without reference to such a law, and without applying the liberal rule of construction, which courts apply for the purpose of carrying into effect the purposes sought to be reached by the enactment of compensation laws.

The decisions in negligence cases such as those above mentioned are not necessarily controlling in cases like the present: for the liability of the employer in cases under the Workmen's Compensation Act arises, not from any wrong done by the employer, but from the statute, which imposes such liability upon persons bearing toward each other the relation of employer and employe as defined in the statute.

Our attention has been called to section 8610, Burns 1914, which provides:

"That at any coal mine in the state where the miners working therein so elect, persons may be employed to act as shot firers, and their wages

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shall be paid by the miners working therein: Provided, that nothing herein contained shall affect any existing contract as to shot firers."

We do not believe that this statute has any controlling influence in the determination of the questions submitted. It does not appear that it had anything to do with the agreement between the Grant Coal & Mining Company and the miners, or that its provisions were considered by them when the arrangement was made for the selection and employment of Mr. Duncan as shot firer.

As said by the Supreme Court in Princeton Coal., etc., Co. v. Lawrence, supra:

"It will be noted that it is not provided in the act that the miners shall have a right to select the shot firers, but if they elect to have shot firers those so electing are to pay their wages."

The company by agreement delegated a right to select, control, and discharge the shot firer to the miners. And as said in Bidwell Coal Co. v. Davidson, supra, "his duty when discharged was discharged in the interest of the company," and, as stated in the facts submitted, was a necessary part of its business. The mining company was using the services of Frank Duncan for pay, and under section 76 of the Workmen's Compensation Act was his employer, and he an employe of the mining company. The method by which the shot firer was paid amounts to nothing more than a matter of bookkeeping, and does not change the relations existing between the mining company and Mrs. Duncan. Bidwell Coal Co. v. Davidson, supra.

In accordance with the authorities herein cited, which we believe to be expressive of the law and supported by reason, we answer each question submitted by the board in the affirmative.

KRAMER v. HUNTINGTON STEEL FOUNDRY CO. (No. 10708.)

(Appellate Court of Indiana, Division No. 2. May 12, 1920.)

127 Northeastern Reporter 284.

1. MASTER AND SERVANT—ASSIGNMENT THAT COMPENSATION AWARD IS CONTRARY TO LAW PRESENTS QUESTION OF SUFFICIENCY OF EVIDENCE.

An assignment of error on appeal from an award by the Industrial Board under the Workmen's Compensation Act that the award is contrary to law is sufficient, under Acts 1917, c. 63, to present the question of the sufficiency of the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

2. MASTER AND SERVANT—COMPENSATION AWARD SUSTAINED BY EVIDENCE CONCLUSIVE.

Where the evidence in a proceeding under the Workmen's Compensation Act tends to support a finding of Industrial Board, its award will not be disturbed on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceeding by Paul F. Kramer under the Workkmen's Compensation Act (Laws 1915, c. 106) to obtain compensation for personal injury, opposed by the Huntington Steel Foundry Company, the employer. There was an award that applicant take nothing, and he appeals. Award affirmed.

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Joseph W. Hutchinson, of Indianapolis, for appellant.
C. K. Lucas and H. B. Spencer, both of Huntington, for appellee.

NICHOLS, C. J. Appellant claims that he was employed in appellee's foundry as a molder, and that while preparing the sand for the molds his feet were burned; that the sand from the molds was hot, and while in that condition was spread on the floor, and water applied to cool and break it up; that, while mixing the steaming hot mass with an ordinary shovel, his feet became overheated and were burned, the circulation of the blood was arrested, his feet became sore, and blood poison resulted, which necessitated the amputation of two toes on his right foot.

[1, 2] After hearing the evidence, the full Industrial Board found that appellant "did not receive a personal injury by an accident arising out of and in the course of his employment resulting in the disability for which he claims compensation by his complaint herein," and made its award that he take nothing. The only question involved in this appeal is whether or not the award of the Industrial Board, based on its finding that the accident which resulted in the injury of appellant did not arise out of and in the course of his employment by appellee, is contrary to law. This is sufficient under Acts 1917, p. 155, to present the question of the sufficiency of the evidence which is the only question presented. Appellant contends that the uncontradicted evidence does not support the finding. We hold that the evidence tends to support the finding, and that the award is therefore not contrary to law. Under such circumstances, it will not be disturbed on appeal. Sugar Valley Coal Co. v. Drake, 117 N. E. 937; American Hominy Co. v. Davis, 126 N. E. 703; Columbia School Supply Co. v. Lewis, 116 N. E. 1.

On the authority of the cases cited, the award of the Industrial Board is affirmed

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ALEXANDER BOX CO. v. CUTSHALL. (No. 10735.)

(Appellate Court of Indiana, Division No. 2. May 12, 1920.)

127 Northeastern Reporter 286.

1. MASTER AND SERVANT—ASSIGNMENT THAT COMPENSATION AWARD IS CONTRARY TO LAW PRESENTS QUESTION OF SUFFICIENCY OF EVIDENCE.

An assignment of error in a proceding under the Workmen's Compensation Act that an award was contrary to law presents the question as to sufficiency of the evidence, under Acts 1917, c. 63.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

2. MASTER AND SERVANT—EVIDENCE NOT WEIGHED ON APPEAL FROM COMPENSATION AWARD.

On appeal from an award in a proceeding under the Workmen's Compensation Act, the court does not weigh the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from State Industrial Board.

Proceeding by Serelda Cutshall under the Workmen's Compensation Act (Laws 1915, c. 106) to obtain compensation for the death of her husband, opposed by the Alexander Box Company, the employer. There was an award of compensation, and the employer appeals. Award affirmed.

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Everett W. Trook and Elmer E. Stevenson, both of Indianapolis, for appellant.

Schmollinger & Willis, and Hottel & Patrick, of Indianapolis, for appellee.

NICHOLS, C. J. Appellee claims that her decedent, who was her husband, was an employe of appellant, working in its factory as a cooper, and that while so working he lacerated the back of his right hand on a nail that was in a barrel which he was repairing, from which injury death resulted in eight days. His only dependent was his wife, appellee.

There was a finding in favor of appellee that the injury which resulted in death was caused by accident arising out of and in the course of decedent's employment, and an award followed, giving appellee compensation for 300 weeks at the rate of $8.25 per week, beginning August 14, 1918, ordering appellant to pay burial expenses not to exceed $100, attorney's fees of $162, and costs.

On appeal appellant assigns as error that the award was contrary to law, and that the finding and award is not supported by sufficient evidence.

[1] The question presented by the second assignment of error is presented by the first assignment. Acts 1917, p. 155.

[2] We have examined the evidence as set out in the briefs. There is some contradiction therein, but this court does not weigh the evidence. Columbia School Supply Co. v. Lewis, 116 N. E. 1. The evidence, together with the reasonable inferences therefrom, fully sustains the finding. On the authority of Sugar Valley Coal Co. v. Drake, 117 N. E. 937, Columbia School Supply Co. v. Lewis, supra, Root Dry Goods Co. v. Gibson, 123 N. E. 134, Hege & Co. v. Tompkins, 121 N. E. 677, and American Hominy Co. v. Davis, 126 N. E. 703, the award is affirmed, and under the statute 5 per cent is added thereto.

BERSCH v. MORRIS & CO. (No. 22666.)

(Supreme Court of Kansas. May 8, 1920.)

189 Pacific Reporter 934.

(Syllabus by the Court.)

1. MASTER AND SERVANT — "WILLFUL" ACT DEFEATING COMPENSATION DEFINED.

The meaning of the word "willful," as used in the statute denying compensation to a workman injured through willful failure to use a guard against accident provided by his employer (Laws 1917, c. 226, § 27), is not necessarily fulfilled by voluntary and intentional omission, but includes the element of intractableness, the headstrong disposition to act by the rule of contradiction.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

(For other definitions, see Words and Phrases, First and Second Series, Willful.

2. MASTER AND SERVANT — COMPENSATION HELD NOT DEFEATED BY WILLFUL FAILURE TO USE GUARD.

Finding of fact and evidence sustaining the general verdict considered, and *held*, the plaintiff, who was injured because of failure to replace

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guards which he had removed from a casing machine which he was cleaning, was not precluded by the statute from recovering compensation.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

Appeal from District Court, Wyandotte County.

Action by Jacob Bersch against Morris & Co. for compensation under the Workmen's Compensation Law. Judgment for plaintiff, and defendant appeals. Affirmed.

C. W. Trickett, of Kansas City, Kan., for appellant.
W. W. McCanles, of Kansas City, Mo., for appellee.

BURCH, J. The action was one for compensation for injuries received by a workman while cleaning a casing machine in the defendant's packing house. The defense was that the plaintiff willfully failed to use a guard, provided by the employer, which would have prevented the accident. The plaintiff recovered, and the defendant appeals.

A witness for the defendant described the machine as follows:

"The machine weighs about 2,500 or 3,000 pounds, and consists of a scraper, a clipper, a drum, a big iron cylinder or roller, a cast-iron roller, and two small rubber rollers. They have got iron through the center, and there is rubber around the outside of them and they are covered with canvas. What we call the scraper and the clipper both revolve the same way around and clean the casing. The casing runs in between the drum and the scraper, and there is where it is cleaned. The small rollers are about 18 inches long and about 4 or 5 inches in diameter. Under these are spray pipes. The machine is run by a belt which runs to another pulley on a shaft line. There is a lever comes down, and you throw the belt from a loose pulley into the pulley that runs the machine."

There is a cover or guard in front of the scraper, another at the rear of the machine, and a piece of sheet iron with a handle is laid over the top.

After a day's work, the operator of a machine cleans it. A witness for the defendant described the method of cleaning the machine as follows:

"To clean the machine he has to take a hose and wash the machine off with the hose. Then he is supposed to stop the machine and wipe the knives off, or blades, on the scraper. They are not knives; they are blades. They are hoop iron, rounded off. They are about 1½ inches wide and 18 inches long. He is supposed to stop the machine. * * * Then after wiping off the blades, we put the guards on, and then start the machine running, and then wipe the drum."

Another witness for the defendant testified as follows:

"To clean the machine, when you get done with the casing, we take the top part back behind the guard, you know, take that off, and turn the hose of hot water, and shoot right into the knives, into the blades, in order to wash it all off. When we done washed it, we stop the machine, and take the front guard off. Then we take the front guard off and take a rag and wipe the blade off right clean. When we done wiped it, we put the front guard on and start the machine again and oil the drum, take and oil it like that. After we get done oiling the drum, then we stop the machine again and take the front guards off and oil the blades afterwards; then you done with it."

With a verdict for the plaintiff, the jury returned the following findings of fact:

"Q. 1. Did the foreman, L. Roebling, instruct the plaintiff to never run said machine with the front guard removed? Answer: Yes.

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"Q. 2. Dia the plaintiff remove the front guard from said machine shortly before the time of the accident? Answer: Yes.

"Q. 3. Did the plaintiff neglect to replace said guard before starting the machine? Answer: Yes.

"Q. 4. Would this accident have occurred had the plaintiff replaced the guard on said machine? Answer: No."

[1, 2] The plaintiff was born in Russia, spoke German, and testified through an interpreter. His meaning is not always clear, but he testified to this effect: The method of cleaning the machine was to take off the guards, wash the machine with the hose, and then use the drying cloth, drying the bug drum at the bottom first, and then the blades. The machine was kept running until the time came to dry the blades, when it was stopped. It will be observed that this order of performing the work is quite different from that described by witnesses for the defendant. The plaintiff used a cloth to dry the machine after washing it. The interpreter reported him as saying the cloth got caught while he was drying the small rolls on top. Afterwards he said he was hurt while he was drying the big drum. Of course, that was the account of the injury which he intended to give. The plaintiff said he could not clean the machine with the cover on, and that he took the guards off so he could clean the machine with the hose and water. After telling how he washed and dried the machine, the plaintiff said: "I couldn't put the guards back on until it was all done." Of course, he could have stopped the machine and replaced the guards at any time, and he probably meant that replacing the guards was the last act, as taking them off was the first act performed in the process of cleaning and drying the machine.

Conflicts in the evidence not settled by the findings of fact were resolved by the jury in the plaintiff's favor. The plaintiff was not at fault because the machine was running. He was wiping the drum, and it was proper, as the defendant's witnesses admitted, that the drum should be revolving, under application of power. If it were irregular for the plaintiff to remove the front guard in order to wash the machine with the hose, removal of the guard did not cause his injury. His fault, if any, lay in not replacing the guard before wiping the drum. To the plaintiff it appeared to be necessary to remove the front as well as the back guard in order to wash the machine. If he measurably comprehended the instruction not to run the machine at all with the front guard off, as the jury may have doubted, it did not seem to him that the instruction applied to the process of flushing the machine, because in his judgment he could not do that with the cover on. If he ought to have replaced the guard before attempting to wipe and oil the drum, he did just what the third finding indicates—he neglected to replace the guard. While he did this contrary to instruction, and so may be said to have been guilty of conscious, voluntary omission, he did not mean to oppose his will to the will of his employer, in any perverse or refractory sense. At least, the members of the jury, who saw the man, gauged his capacity, formed an opinion of his disposition, and weighed his testimony, were authorized to reach that conclusion.

In the case of Thorn v. Zinc Co., 106 Kan. 73, 186 Pac. 972, the court's interpretation of the statute, "willful failure to use a guard or protection against accident required pursuant to any statute and provided for him" (Laws 1917, c. 226, § 27), was foreshadowed:

"Nor is it material that the defendant may have been guilty of a high degree of negligence. Messick v. McEntire, 97 Kan. 813, 156 Pac. 740. To warrant a reversal the court must declare as a matter of law that the injury resulted from his willful failure to use a guard and protection furnished by his employer. It has been said that, in order to defeat an award because of a statutory exception, the case must be brought clearly within it (Wick v. Gunn [Okl.] 169 Pac. 1087), and that the mere voluntary and intentional omission of a workman to use a guard or protection fur-

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nished to him is not necessarily to be regarded as willful (Same Case; also, General American Tank Car Corp. v. Borchardt [Ind. App.] 122 N. E. 433; to the contrary, see Bay Shore Co. v. Industrial Acc. Com., 36 Cal. App. 547)." Thorn v. Zinc Co, 106 Kan 73, 75, 186 Pac. 972, 973.

In harmony with the views expressed in the Indiana and Oklahoma cases cited, the court now holds that the meaning of the word "willful," as used in the statute, includes the element of intractableness, the headstrong disposition to act by the rule of contradiction. Such is a general and popular signification of the term.

"Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse." Webster's New International Dictionary.

The judgment of the district court is affirmed.

All the Justices concurring.

MAZEFFE v. KANSAS CITY TERMINAL RY. CO. (No. 22662.)

(Supreme Court of Kansas. May 8, 1920.)

189 Pacific Reporter 917.

(Syllabus by the Court.)

MASTER AND SERVANT — RAILWAY EMPLOYEE'S INJURY WHILE CROSSING YARDS OF ANOTHER COMPANY ON WAY TO WORK HELD NOT ONE "ARISING OUT AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

A terminal railway company was engaged in constructing an embankment on which to lay a railroad, and a workman employed by the company in making the embankment was killed while crawling under a car in the yards of another company, at a distance of about 350 feet from his place of work. He had choice of several routes of travel in order to reach his work. Although the workmen and others frequently crossed the yards in which he was killed, in going to and from their work, no right of ingress or egress over them had been given to the terminal company, and that company had no interest in or control over the yards. *Held*, that the accident to the workman occurred while he was on his way to assume the duties of his employment, and that his injury and death did not arise out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from District Court, Wyandotte County.

Action by Rosalie Mazeffe against the Kansas City Terminal Railway Company for compensation under the Workmen's Compensation Law for the death of her husband, Joseph Mazeffe. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. McCanles, of Kansas City, Mo., and Keplinger & Trickett, all of Kansas City, Kan., for appellant.

O. L. Miller, of Kansas City, Kan., and S. W. Moore and John H. Lathrop, both of Kansas City, Mo., for appellee.

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JOHNSTON, C. J. In this action plaintiff sought a recovery for the death of her husband, Joseph Mazeffe, under the Workman's Compensation Law (Laws 1917, c. 226). He was an employe of the Kansas City Terminal Railway Company and was killed on his way to the place of work and before he had reached the premises of the defendant. The court held that the accident which resulted in the death of the employe did not arise out of and in the course of his employment, and from that ruling plaintiff appeals.

Only the findings of the court have been brought into the record, and upon them plaintiff insists that she was entitled to judgment. A brief abstract of the material findings will be stated. The defendant is a railway company organized for the purpose of providing terminal facilities for a large number of railroads entering and operating in Kansas City, including that of the Union Pacific Railroad Company. The stock of the defendant company is owned by the railroad companies for which the terminal facilities are provided, but it is a separate entity, and it does not own any right or interest in these railway companies. At the time of the accident it was engaged in constructing an embankment up to the edge of the Union Pacific yards and an elevated structure which extends several hundred feet across the Union Pacific tracks and on several miles to the Union Station in Missouri. The deceased employe was engaged in making the fill or embankment which reached to an abutment on the edge of the Union Pacific yards and had nothing to do with the elevated structure over the yards. The defendant had purchased outright from the Union Pacific Railroad Company an easement for the structure across its yards, but no part of its yard or tracks was included in the defendant's terminal facilities, nor was the defendant given any right in the yard or tracks of the Union Pacific Railroad Company. There was no provision in the grant of an easement to the defendant or in the operating agreement that the Union Pacific Railroad Company should furnish the defendant any trackage or way of ingress or egress in the building of its line and structure. On the morning of the accident Mazeffe was found dead on a switch track of the Union Pacific Railroad Company about 350 to 400 feet south of his place of work and about 80 or 90 feet west of the elevated structure that was under construction. There was no eyewitness of the accident, but upon the circumstances it was found that he was on his way to work and was killed while crawling under a car of the Union Pacific Railroad Company. The distance directly from his home across the Union Pacific yards was 2,200 feet, and the route taken on the day of the accident was about seven-eighths of a mile long. While there were notices in these yards warning the public against trespassing on the railroad property, many workmen passed over the yards without interference. Mazeffe and other workmen employed on the fill were free to choose their own way of going to and from the place of work. There were two other routes Mazeffe might have chosen in going to his work that would have involved less danger. One was a distance of about 1½ miles, and the other about 2 miles, but any way he might have chosen involved the crossing of one or more tracks. To go across the shortest way, which was the one chosen on the morning of the accident, it was necessary for him to cross a large number of tracks, and to get around cars stored and moving in the yards, it was usually necessary to go an increased distance, but it was never necessary to crawl under the cars.

The finding of the trial court that the injury and death of Mazeffe did not arise out of and in the course of his employment must be sustained. He met his death not at the place of work, nor on the premises of the defendant, nor yet at a place which was under his employer's control or subject to its direction, but while he was on his way to work and on the premises of another. A recent statute provides that:

"The words 'arising out of and in the course of employment' as used in this act shall not be construed to include injuries to the employe oc-

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curring while he is on his way to assume the duties of his employment or after leaving such duties, the approximate cause of which injury is not the employer's negligence." Laws 1917, c. 226, § 2.

Difficulty has been found in some cases in determining whether injuries for which compensation was asked arose out of and in the course of employment, but the statute cited makes it clear that an injury does not come within its application if it was sustained while the employe was on his way to assume the duties of his employment. The application of that rule eliminates debatable questions that have arisen under other statutes as to whether the accident happened within the locality or danger zone of employment, and therefore little is left for decision in the case. The accident did not occur while the employe was in the performance of any duty within his employment nor at a place that was under the control of his employer. It was not necessary to a liability that he should have had the tool in his hand and engaged at work when the accident occurred, but it is essential that the relationship of master and servant continued to exist, and that he was within the control and subject to the orders of the defendant. Sedlock v. Mining Co., 98 Kan. 680, 159 Pac. 9, L. R. A. 1917B, 372. It has been held that a miner was not within the application of the act while he was going upon an errand of his employer from one mine to another, which were only a quarter of a mile apart, and was fatally injured while crossing an interurban track that ran between the mines. It was there concluded that the accident did not occur in such close proximity to the mine as to be within the danger zone necessarily created by the hazards of the work, and that he was not within the Compensation Act, although he was carrying a message for his employer from one mine to the other. Bevard v. Coal Co., 101 Kan. 207, 165 Pac. 657.

Here the employe was not in any sense doing anything that fell within his employment, and was not acting under the direction of the employer when he was injured. He was a considerable distance from his place of work and upon the premises of the Union Pacific Railroad Company. As we have seen, that company had nothing to do with the work on which the employe was engaged, and there was no agreement that defendant or its employes should have ingress or egress to or over the yard of that company. While it was necessary for him to travel from his home to the place of work, he was not then in the control of his employer, and was free to choose his route, and when injured he was outside instead of within the zone of his employment. The claim for compensation is no more within the provisions of the act than if the accident had occurred as he left his own doorstep or when traveling to his work over a street a mile or more from his work. The fact that the Union Pacific Railroad Company owned stock in the defendant corporation did not give the defendant or its employes any rights in the yards of the former company, nor add the yards to the premises of the defendant on which the fill was being made. Mazeffe had no duty to perform in those yards, and neither did he have anything to do with the work on the elevated structure that was being built over the yards. We conclude that the accident occurred when the deceased employe was on his way to assume the duties of his employment, and that his injury and death did not arise out of and in the course of his employment.

Judgment affirmed.

All the Justices concurring.

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ROMEREZ v. SWIFT & CO. (No. 22684.)

(Supreme Court of Kansas. May 8, 1920.)

189 Pacific Reporter 923.

(Syllabus by the Court.)

MASTER AND SERVANT—KILLING OF EMPLOYEE BY FELLOW SERVANT HELD NOT TO ARISE OUT OF EMPLOYMENT WITHIN COMPENSATION ACT.

The deceased, with another Mexican, was engaged in trucking livers in the defendant's packing house. An altercation occurred between him and a colored ox tail trucker resulting in a fight which was reported to the foreman. Shortly after this the colored man and another workman were engaged in trucking ox tails, when the deceased and his partner, coming along within 10 or 12 feet of them, were abused and called names by the colored workman. The two Mexicans left their truck and approached the colored men and engaged in an altercation with them during which one of the colored men stabbed and killed the deceased. *Held*, that the injury did not arise out of employment, and therefore the defendant is not liable.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Appeal from District Court, Wyandotte County.

Action by Cresencia Romerez against Swift & Co. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Russel Field, of Kansas City, Mo., for appellant.

Herrod & Roberts, of Kansas City, Kan., for appellee.

WEST, J. Cresencia Romerez brought this action to recover for the death of her son, Juan Romerez, at the defendant's packing house, and recovered. The defendant appeals. Juan Romerez and Jose Lopez were meat truckers, as was also a fellow worker, Basil Sims. The duty of Juan and Jose was to truck beef livers and hang them on racks. A quarrel arose between Sims, a trucker of ox tails, and Juan, resulting in an injury to the latter and some loss of blood, which caused the foreman to send him to the doctor's office. Jose did not wish to continue the work of trucking alone, and was told to wait until his partner, Juan, returned. Sims got behind with his work, and another employe named Hall was sent to assist him. When Juan and Jose passed these two, it is claimed that Hall made insulting remarks which caused a quarrel between him and Juan. Hall ran to another part of the building, secured a knife, returned, and stabbed Juan, who died almost instantly. The claim of the defendant was and is that the death was not an injury by accident arising out of and in the course of his employment.

It is argued that in entering upon a quarrel with Hall, and stopping at the rack where Hall and Sims were working, Romerez departed from his employment, and was not engaged in the duty he was employed to perform, but, on the contrary, was interfering with the employer's business. One witness testified:

"When we came in Sims was up on this keg hanging tails and Hall was standing on one side. We were passing Sims and Hall to take our truck about 10 or 12 feet beyond them, when Hall started calling us names. We stopped there because he began saying things. Juan and Sims began to argue, and Hall went after the knife."

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Another witness testified:

"The Mexicans left the truck in the alley and come back to the negroes. The negroes started hollering. Told the Mexicans to 'get out.' I was about 30 feet away. The Mexicans and the negroes were jumping back and forth. I saw the negro hit the Mexican, and he turned around and fell."

Another workman:

"Sims was hanging tails. Mexican say to Sims, 'I say I get you; you got me.' Mexican stopped pushing truck and take knife and jump for Sims. Sims was on a tierce. Hollis Hall say, 'Get out of the way, Mexican; get out of the way, Mexican; and Mexican jumps for Sims, and Sims holler and was scared, and this Mexican jumping all the time for Sims, and Hall holler, 'Get out of the way, Mexicano; I hit you.' * * * I was within five feet of them when the Mexican was stabbed. * * * He [the Mexican] called Sims a ——, and jumped for Sims with a knife. * * *"

Quite an attempt was made to show that Hall was sent down as a peacemaker, but objections were sustained, and the attempt failed. Offers were made to prove that the foreman instructed Hall to go down and work with Sims, and if there was any trouble between the Mexicans and Sims to stop it; also to prove that Hall had stated that the foreman sent him down to work with Sims, and if there was any trouble down there he was instructed to stop it. Lopez testified that the foreman told Sims to go back to work, and Sims said he was afraid of the Mexicans; that the foreman told him not to worry; he would get him another partner, "so they won't jump on you." Sims himself testified that after the first fight when the Mexicans both jumped on him he went up stairs to the boss, and the Mexicans were there, and told the foreman that he had had a fight with them and did not care to go back there any more. Repeated efforts were made to get Sims to say that the foreman told Hall to go down stairs and work with him, and that if there was any further trouble to stop it. He was finally induced to say that he had made the statement to some one that the foreman told Hall to go down and help him catch up with his work, and "if the Mexicans started anything to get out of there and not have nothing to do with them." That all indicates that, if there was any direction by the foreman for Hall to quiet any disturbance, it was on the theory that the Mexicans might start a disturbance, and not the colored boys, and the testimony already quoted indicates that, aside from the abusive language used, the assault started from the Mexican side. At least there is nothing in the record to show, and, had the offered evidence been received, there would have been nothing to indicate, that the foreman had any reasoin to think there would be an assault by Sims and Hall on the Mexicans, or either of them.

It is quite clear that, had the deceased been working elsewhere, he would not have been in danger, and that the trouble with Sims arose out of a collision quite liable to occur at such work, and that the fatal fight was a result, direct or indirect, of the Sims altercation. Whether the injury arose out of the employment remains to be seen.

It is contended by the defendant that the court should not have held the employer liable unless the danger of being assaulted either willfully or sportively inhered in the nature of the employment, and it is said that in all of the cases found in the books where the employer has been held liable the injured man was hurt in the course of his employment, and was not actuated by feelings of animosity towards his fellow workmen; also that Romerez and Lopez stopped their truck and came to the place where Hall and Sims were at work on account of the names the former had been called by the latter, and that Romerez turned aside and stopped his work for his employer, and entered into an altercation whereby he lost his life, owing to his personal animosity towards Hall.

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While it might be plausibly argued that the foreman must have known after the encounter between the deceased and Sims in the very course of nature another altercation might result from throwing them together, and in permitting Lopez to wait until his partner returned from his interview with the doctor the foreman expected him to have the protection which a working partner might afford, and hence had a reasonable suspicion that such protection might be necessary, the serious block to this line of reasoning is that there was no assault except by words until the Mexicans left their truck and engaged in their quarrel with the negroes 10 or 12 feet away, and it is impossible to say that this situation was one reasonably to be expected by the employer. However much provocation or justification may have existed for the resentment felt by Romerez on account of the abusive language used by the negroes, the fact remains that he stepped aside from his work and left his task to settle this matter of personal spleen. It cannot be held that in so doing he was in the line of his employment, or that the regrettable result arose out of such employment. Kiser, Workmen's Compensation Acts, p. 80, § 72; Jacquemin v. Turner & Seymour Mfg. Co., 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E, 496; Griffin v. A. Robertson & Son, 176 App. Div. 6, 162 N. Y. Supp. 313; Stuart v. Kansas City, 102 Kan. 307, 171 Pac. 913; White v. Stock Yards Co., 104 Kan. 90, 177 Pac. 522; Benson v. Railway Co., 104 Kan. 198, 178 Pac. 747; Thomas v. Manufacturing Co., 104 Kan. 432, 179 Pac. 372.

"The injury by accident must have occurred as something which would not have occurred but for the circumstances of the employment and as having been something due to it (the employment), and it must further have occurred during its currency. [Lord Haldane in Lancashire & Yorkshire Ry. v. Highley, 15 N. C. C. A. 210, 244.]" 104 Kan. 203, 178 Pac. 747.

The judgment is reversed, with directions to enter judgment in favor of the defendant

All the Justices concurring.

SLATER ET UX v. ISMERT-HINCKE MILLING CO. (No. 22634.)

(Supreme Court of Kansas. May 8, 1920.)

189 Pacific Reporter 908.

(Syllabus by the Court.)

MASTER AND SERVANT — COMPENSATION FOR MINOR'S DEATH HELD NOT SUBJECT TO DEDUCTON FOR HIS SUPPORT.

In an action under the Workmen's Compensation Law by the parents of a minor son to recover compensation for his death, it was shown that his ernings, which averaged $17.45 per week, were turned over in full to his parents, and that the parents were partially dependent upon such earnings; that he paid no board, but that the expense to his parents for his support was $5 per week. *Held*, that in ascertaining the average yearly earnings of the minor, and in fixing the degree of dependency of the parents, the employer is not entitled to a credit or deduction for the expense of the minor's board and support.

(For other cases, see Master and Servant, Dec. Dig. § 386[2].)

Dawson, J., dissenting.

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Appeal from District Court, Shawnee County.

Action by Ira S. Slater and wife against the Ismert-Hincke Co. for compensation under the Workmen's Compensation Law for the death of Almon Slater, plaintiff's infant son. Judgment for plaintiff, and defendant appeals. Affirmed.

E. H. Henning, Thad B. Landon, and A. F. Sherman, all of Kansas City, Mo., for appellant.

A. E. Crane, of Topeka, for appellees.

PORTER, J. The Ismert-Hincke Milling Company is a corporation operating a flour-mill in the city of Topeka. It is under the provisions of the compensation law (Laws 1911, c. 218, as amended by Laws 1913, c. 216). On the 17th day of October, 1918, Alman Slater, a boy 16 years of age, was in the employ of the milling company, and was killed in an accident while in the course of his employment. His father and mother brought this action to recover under the Workmen's Compensation Act for his death.

The court made findings of fact which show that the boy had been in the employ of the Ismert-Hincke Milling Company less than two months at the time of his death. He was receiving wages at the rate of $17.45 per week, which was the average weekly wage paid to workmen in the same kind of employment. His father, Ira S. Slater, who for more than a year had been in the employ of the milling company, was receiving exactly the same wages. Each week during the time of his employment, the boy turned over all his wages to his father, and which, together with the wages received by his father, was used for the support and maintenance of plaintiff's family, which consists of the father, mother, and six children ranging in age from 2 to 14 years. The deceased lived at home with his parents, and received his board and keep the same as the other children, no charge being made therefor. His father gave him small amounts of spending money from time to time. The court finds that the fair value of his board and maintenance, including such spending money, amounted to about $5 a week, and that the plaintiffs were dependent upon the earnings of the son to the amount and extent of $17.45 per week, and were dependent to the extent of all of his earnings. As a conclusion of law from the foregoing facts, the court held that plaintiffs were entitled to recover under the compensation law the sum of $2,722.20, and judgment was rendered for that amount.

The Ismert-Hincke Milling Company appeal from the decision, and the sole contention is that it should be given credit for the $780 which would be the amount of the cost of the board and keep of the plaintiffs' son had he lived for the period of the 3 years for which compensation is fixed. The plaintiffs insist that the son was under no obligation to pay and was not paying board at the time of his death, and therefore that the expenses should not be held as reducing the amount of his earnings, or as affecting the extent of plaintiffs' dependency. Under the provisions of section 5905, Gen. Stat. 1915, as amended by Laws of 1917, c. 226, § 3, where death results from injury and the workman leaves dependents wholly dependent upon his earnings, the amount of compensation is fixed at a sum equal to three times his average yearly earnings, but not to exceed $3,800 and not less than $1,400. Where he leaves persons in part dependent upon his earnings the compensation is fixed at "such proportion of the amount payable under the provisions" of the preceding clause "as may be agreed upon or determined to be proportionate to the degree of dependency." The proportion of the dependency was not agreed upon in this case, and was not expressly found by the trial court, further than the finding that the parents needed all of the son's earnings.

The question is not free from difficulty. There is, however, no provision in the statute that in case of the death of a workman the cost and

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expense incurred in his board and support during his lifetime shall be taken into consideration for any purpose. It is conceded that the minor in this case was not paying board. His parents were obliged to support him, and were entitled to all his earnings. It is argued with much force, too, that there is no more reason for deducting the living expenses of a minor than there would be to make such deduction from the earnings of the father in case of his death. There being no express provision in the statute, it must be held that in ascertaining the average yearly earnings of the minor, and in fixing the degree of dependency of the parents, the employer is not entitled to a credit or deduction for the expense of the minor's board and support.

The judgment is affirmed.

Johnston, C. J., and Burch, Mason, West, and Marshall, JJ., concurring.

DAWSON, J. (dissenting). Monetary compensation for the injury or death of a workman is a cold-blooded proposition, but it is the only practical reparation that can be given in this imperfect world (Truman v. Railroad Co., 98 Kan. 761, 766, 161 Pac. 587), and this heartless reparatory yardstick is to be used as an unsentimental matter of mathematical calculation. Whatever part of the boy's wages was devoted to feed, clothe, and shelter himself was obviously not used to support his parents. It is that portion of his wages which was devoted to his parents' support, not to his own support as well as theirs, nor to the support of all the family as well as his parents, that is the basis for determining the amount of compensation to be assessed against the defendants. McGarvie v. Coal Co., 103 Kan. 586, 175 Pac. 375. I therefore dissent.

VASSAR et al. v. SWIFT & CO. (No. 22683.)

(Supreme Court of Kansas. May 8, 1920. Rehearing Denied June 14, 1920.)

189 Pacific Reporter 943.

(Syllabus by the Court.)

1. MASTER AND SERVANT — OBJECTION TO WANT OF NOTICE CANNOT BE RAISED FOR FIRST TIME ON APPEAL IN COMPENSATION CASE.

In an action under the Workmen's Compensation Act, the answer was a general denial. On the trial it was shown that no notice of the accident was given to the employer wihtin 10 days as required by section 5916, Gen. Stat. 1915. No instructions were asked with respect to the question of notice, and, the record failing to disclose that the question was called to the attention of the trial court, *held* that it is too late to raise the question in this court.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

2. MASTER AND SERVANT—DYING DECLARATIONS ADMISSIBLE IN COMPENSATION CASE.

The rule, announced in Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625, 50 L. R. A. (N. S.) 1167, Ann. Cas. 1915D, 212, that dying declarations are admissible in civil cases, followed and applied in a workmen's compensation case.

(For other cases, see Master anr Servant, Dec. Dig. § 404.)

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3. MASTER AND SERVANT—DYING DECLARATION HELD FOR JURY IN COMPENSATION CASE.

The evidence is *held* sufficient to take to the jury the question of the declarant's fear of impending death and the question of the credibility of the declarations.

(For other cases, see Master and Servant, Dec. Dig. § 409½, New, vol. 7A Key-No. Series.)

Appeal from District Court, Wyandotte County.

Proceedings under the Workmen's Compensation Act by Etta Vassar and others to recover for the death of John Vassar, opposed by Swift & Co., employer. Judgment for claimants, and employer appeals. Affirmed.

Russel Field, of Kansas City, for appellant.

W. W. McCanles, of Kansas City, for appellees.

PORTER, J. In a workman's compensation case the plaintiffs recovered a judgment for $2,964 for the death of John Vassar. The defendant appeals.

The deceased, who was 53 years of age at the time of his death, had been in the employ of Swift & Co. for 11 years; his work was loading refrigerator cars. It is claimed that his duties required him to lift heavy pieces of beef, and that in doing so he strained his side, and, because of the low temperature of the car, contracted pleurisy, which resulted in his death. The answer was a general denial.

The serious question of fact was whether the deceased received any injury while in the employ of defendant that had anything to do with his death. The testimony of Etta Vassar, the widow, shows that on August 25, 1918, her husband came home at his usual time, about 3 o'clock in the afternoon; he was walking with his hand on his side and said he was awful sick and that his left side was hurting him; he went to bed, and she put hot applications on his side, rubbed it with turpentine and lard, and kept up this treatment for three days, when a physician was called. For a period of two weeks prior to his death he recovered sufficiently to be up and around the house and at times out on the back porch, and walked with a cane. Later, he took to his bed again and died on October 26, about two months after the alleged injury.

Two physicians testified that pleurisy might result from a blow or bruise on the side where it is claimed the deceased was injured, and that pleurisy developed in that manner might have caused his death. One of these physicians, Dr. Nason, treated the deceased from September 20th until his death. Dr. Nason made out the death certificate, which contained the statement that the cause of death was : "Pleurisy, duration ten days; contributory, secondary, typhoid fever, four months."

He testified that the "four months" was a mistake and intended to be two months. He admitted that in certifying to the cause of death he had not stated anything about an injury, and that, in a conversation in reference to the matter with a claim agent from Swift & Co. in January or February, he had made no mention of injuries.

Dr. Barker was called to treat Vassar on August 28th and continued in charge of the case until the family called Dr. Nason on September 20. He testified that he diagnosed the sickness as typhoid; he described the finding of a tenderness in the area where it is found in such cases and the rash on the abdomen and legs; for three weeks the patient had the typhoid temperature, reaching its maximum toward midnight, and then gradually lowering until 7 or 8 o'clock in the morning, when it would gradually rise again.

He further testified:

"It ran a very typical typhoid fever course, and I treated him for

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typhoid condition and kept him on the liquid diet and kept him quiet and had them give him the usual baths when his temperature would run the highest. And the temperature usually yielded to that treatment. * * * Gradually went down, after a period of two or three weeks. * * * Each morning it was a lower temperature, and it would go up, typical of a typhoid condition, but each subsequent day it would become a little less. * * * I examined practically all the functions of the body, and I could not find anything in that way that might cause this fever, except the typhoid condition. * * * Found no symptom of any injury to the lung, or that of pleurisy at all. In fact, the respiration did not show any symptom of it."

Testifying as to the condition of Vassar when he left him on the 20th of September, he said that he found no tenderness on the left side covering the pleural cavity. The history of the case and the condition of the patient in his opinion showed that of one recovering from typhoid fever.

"He kept insisting on eating a whole lot of food. * * * I told him that he must stay off the solid foods for at least eight or ten days yet. * * * Relapses often follow in cases of typhoid fever. That is the way a good many people die from typhoid. * * * When I left this man he was almost well, but he was weak, decidedly weak, from this condition; but he was gaining."

The superintendent of the refrigerator department and the foreman in charge of the men with whom the deceased had been at work, and six of the workmen, were witnesses. Several of these had known Vassar for many years. The six workmen were what is known as "luggers." The testimony of the superintendent, the foreman, and these workmen was to the effect that Vassar was what is known as a "hanger" of beef in refrigerator cars, and was engaged in "hanging" the forequarters of beef which were carried into the car by luggers, and lifted up by the lugger and hung upon a hook fastened in the car. They testified that the only duty the deceased had to perform was to fasten this hook in the beef, and when he had done this to say, "Let go," when the lugger dropped the beef so that it hung suspended on the hook. Each of these witnesses testified he had no knowledge of any accident ever having happened to Vassar. His fellow workmen knew that he was absent from work, but understood that he was sick.

Fred Widener, who had been employed at Swift's for 22 years and was well acquainted with the deceased, testified that about a month or six weeks before Vassar's death he visited him at his house for 15 or 20 minutes.

"He was sitting in the chair. He said nothing to me about having received an injury by accident. He said nothing about the cause of his sickness. He didn't say that he knew the cause."

The superintendent testified that it was his duty to investigate the cause of every accident for the purpose of avoiding a repetition of it and to discover who was responsible and whether it was due to carelessness, and also to keep track of the wages of the injured employe and see that he got his compensation. The testimony is that the company had no notice of any claim that the deceased had ever been injured at the plant until January 17, 1919; that he inquired of every person about the plant who might know anything about such an accident, and was unable to find one who had ever heard of it or knew anything about it.

Mr. Larson, the foreman of the deceased, testified that it was his duty in case of an accident to make a report of it; that he had never heard of an accident to Vassar. He had known John Vassar about nine years.

"Mr. Vassar didn't have to lift beef; he didn't have anything to do with the lifting. * * * Mr. Vassar was a beef hanger all the time I knew him. I saw him nearly every day in the month of August, 1918.

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My duties there are looking after the beef loading. * * * I have never known a beef to slip from the hook after it had been hooked. * * * In hanging the forequarter a hanger has to puncture a hole between the third and fourth rib, with the hook. * * I never knew of a forequarter tearing loose when hanging up. * * * There is a hook hanging from the ceiling, about 18 inches long, and the hook is there in place already on the wall, and it is his duty to hook that into the quarter when it is carried in by the beef lugger."

One defense urged is that no notice of any kind in reference to the accident was given by the plaintiffs or by John Vassar. It appears there was no reason why a notice could not have been given. There was nothing in Vassar's condition to have prevented it immediately after he quit work, and the evidence is that he was up and around the house for two weeks before his death. The Workmen's Compensation Act (Gen. Stat. 1915, § 5916) requires that notice of the accident, stating time, place, and particulars thereof, shall be given within 10 days after the accident occurs, or the action cannot be maintained; but there is a further provision in the same section that—

"The want of, or any defect in such notice, or in its service, shall not be a bar unless the employer proves that he has, in fact, been thereby prejudiced."

[1] The plaintiffs' contention that the defendant failed to show prejudice is, we think, untenable. The uncontradicted evidence is that it had no notice or knowledge of any claim of an accident until January 17, 1919. This was nearly five months after its alleged occurrence. If notice had been given within 10 days, when matters were fresh in the minds of the other workmen, it is obvious that the defendant would have found it much easier to have produced evidence to show whether, in fact, the deceased sustained an accident. It was not necessary, of course, for the defendant to produce a witness to state that defendant sustained some prejudice. The facts about which there is no dispute speak for themselves. The difficulty, however, is that defendant never raised the question in the court below. The answer was a general denial. There is nothing in the record which indicates that the question of notice was called to the attention of the trial court; no instructions were asked with respect to the question of notice or plaintiffs' right to recover by reason of a lack of notice, nor was the defense in any way suggested or referred to in any of the instructions. Neither the court nor the jury was called to pass upon the question. The failure to raise the question below renders unnecessary further comment upon the matter of notice.

The principal question of law involved is whether so-called dying declarations of the deceased were admissible in evidence. The foundation for the introduction of the declarations was the testimony of Mrs. Metheson, a neighbor, and Clyde Vassar, son of the deceased. Mrs. Metheson testified that Vassar's death occurred on Saturday and that on the previous Sunday she was over at his home and he was lying in bed twisting, holding his side and groaning. The witness was there about 30 minutes; she sat down beside his bed and asked him how he felt.

"And he told me that he felt bad. He says: 'I am not sick. It is the pain that is killing me.'

"Q. What, if anything, did he say about whether he thought he could live? A. He told me that he didn't expect to live. He said, 'This pain is so great that I cannot live.'"

Again she was asked:

"What further, if anything, did he say about his expecting to die? A. He says, 'The pain is so great,' he says, 'I cannot stand it.' He says, 'The doctors can do me no good.'

"Q. And did he make any statement as to whether he expected to die? A. He said that he didn't think that he could live.

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"Q. (Relative to his thinking he would die). Just bearing upon that line, if you can think of anything more in the conversation that you had, about what he said about expecting to die. A. He told me the pain was so great, that he was not sick, but the pain was so great that he couldn't live; that he couldn't stand it; the doctor didn't seem to do him any good.

"Q. He said he couldn't live? A. Couldn't live.

"Q. Well, now, what further, then, did he say, if anything, as to how the accident occurred? (The defendant objected on the ground that there was no proper foundation laid under any view of the case. The objection was overruled.)

"Q. You may go ahead. A. He said that he didn't think that anything could do him any good, because he thought there was something bursted or broken in his side."

The witness was then permitted, over objections, to testify that the deceased said—

"He lifted a piece of meat and wrenched his side. He said something popped, like he was shot or something was broken, and he said he liked to never have gotten home."

Clyde Vassar, a son of the deceased, testified to a conversation that occurred about a week before his father died, and he was asked to state what his father said "about getting well and whether he expected to get up." His answer was:

"Well, I went across the street to see him, and I asked him how he felt. * * * He said he was feeling pretty bad—the pain was awful, and he didn't think he could ever stand it very long. And I asked him where he hurt, and he showed me down on his side; that is, just put his hand on his side.

"Q. Was anything stated about where he had gotten hurt or the manner in which he was injured?"

This was objected to for the reason that there was no foundation laid for the question. The court made no ruling, but counsel for defendant made further inquiry, as follows:

"Q. What, if anything, was said by your father, if anything more was said, covering whether or not he expected to live? (An objection was overruled.) A. He said he did not think that he would ever get well, and he said that he thought that the last day that he worked at Swift's—(objection).

"Q. Giving his words, if you can, in substance, what did he say about his expecting to die? (No answer.)

"Q. Relative to his expecting to die, what did he say about that, if anything more? A. That is all he said.

"Q. Did he tell you how long he expected to live? A. No, sir; he didn't."

The witness was then permitted, over the defendant's objection, to testify that his father said—

"The last day he worked at Swift's, he was hanging beef in the car, and that some fellow come in with a quarter of beef and didn't hang it just right, and it was his duty to place it where it should be placed; and in moving the beef the hook slipped out of it, and as he went to catch it he raised his knee up some way, and wrenched his side. He said that was what he thought hurt him in his side."

On the next day, both witnesses who testified to the "dying declaration" were recalled. Mrs. Metheson, the neighbor, was asked if, in the conversation she had testified to, the deceased made any reference to what the doctor had told him about his condition. The question was objected to, but the witness was permitted to testify that when he said that he was going to die, "and I tried to cheer him up and tell him that he may

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not die, he said, yes, the doctor had told him that he could not live." Clyde Vassar, the son, was recalled, and the following question was asked him:

"Q. I will ask you, Clyde, if in the conversation you had with your father there, any reference was made to a statement of the doctor? (An objection was overruled.) A. In connection with what I told you yesterday, he said that the doctor had told him he could not get well."

Mrs. Etta Vassar, the widow, was recalled, and testified as follows:

"Q. Mrs. Vassar, I want to ask you if at any time before your husband died, if you heard the doctor tell him he could not live? A. I did—"

There was no testimony to show whether this statement was made to the deceased shortly before his death, or whether it occurred before or after the time of the alleged conversations with Mrs. Metheson and Clyde Vassar.

[2, 3] The plaintiffs rely, of course, upon the doctrine first announced in Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625, 50 L. R. A. (N. S) 1167, Ann. Cas. 1915D, 212, that dying declarations are admissible in civil cases. The court felt that the time had arrived to declare that the rule limiting the admissibility of such declaration to criminal cases was one which had no reasonable basis to support it. The court is satisfied with the decision in that case, and the only question here is whether sufficient foundation was shown for admitting the statement as a dying declaration. We think it must be held that the evidence was sufficient to show that the statement was made by the deceased at a time when he was under a sense of impending death. It has been held that it is not necessary that the declarant state that he is expecting immediate death, and that, where there is evidence that he had abandoned all hope and regarded his death as impending and certain, sufficient is shown to take to the jury the question of the declarant's fear of impending death and the question of the credibility of the declaration. State v. Smith, 103 Kan. 148, 174 Pac. 551, and cases cited in the opinion.

It follows that the judgment is affirmed.

All the justices concurring.

FREY'S GUARDIAN v. GAMBLE BROS., Inc.

(Court of Appeals of Kentucky. April 30, 1920.)

221 Southwestern Reporter 870.

1. MASTER AND SERVANT—COMPENSATION STATUTES TO RECEIVE LIBERAL "CONSTRUCTION."

Workmen's compensation statutes of doubtful, obscure, or ambiguous meaning, should receive liberal construction to effectuate the legislative purpose, but where the language is plain there is no room for construction, and the meaning expressed must be adopted; the term "construction" necessarily presupposing doubt, obscurity, or ambiguity.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

(For other definitions, see Words and Phrases, First and Second Series, Construction.)

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3. MASTER AND SERVANT — GUARDIAN AND NOT COMPENSATION BOARD DETERMINES FACTS AUTHORIZING ELECTION TO SUE OR ACCEPT BENEFITS FOR INJURIES TO MINOR ILLEGALLY EMPLOYED.

Workmen's Compensation Act, § 30, providing that for injury to a minor employed in willful violation of law an action for damages may be brought "as if this act had not been passed" in lieu of compensation, does not require a reference to the compensation board to determine the existence of the requisite facts authorizing an election to sue or accept benefits under the act, but the right to make such determination rests with the guardian.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

4. MASTER AND SERVANT—COMPENSATION ACT ALLOWS ELECTION WHEN MINOR IS EMPLOYED ON FORBIDDEN MACHINERY WITHOUT OFFICIAL AUTHORITY.

Where a minor is willfully and knowingly employed on dangerous machinery without official authority, required by Ky. St. § 331a, subsec. 9, classification 24, a suit for injuries in lieu of compensation is maintainable under Workmen's Compensation Act, § 30, permitting election in case of illegal employment.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

5. MASTER AND SERVANT — MINOR'S EMPLOYMENT ON MACHINERY WITHOUT SAFETY DEVICES NOT ILLEGAL AUTHORIZING ELECTION TO SUE IN LIEU OF COMPENSATION; "EMPLOYMENT IN VIOLATION OF LAW."

Employer's failure to furnish the safety devices required by Ky. St. § 331a, subsec. 10, does not entitle guardian of injured minor employee to sue for damages in lieu of compensation under Ky. St. Supp. 1918, § 4911, authorizing election where minor is employed in willful and known violation of law such failure not constituting employment in violation of law.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Harvey Frey's guardian against Gamble Bros., Incorporated. Judgment of dismissal, and plaintiff appeals. Reversed, with directions.

James H. Speed, of Louisville, J. K. Claxton, of Butte, Mont., Irwin & Irwin, of Elizabeth, and J. L. Richardson, of Louisville, for appellant.

Humphrey, Crawford, Middleton & Humphrey, of Louisville, for appellees.

THOMAS, J. This suit involves primarily the construction of section 4911, vol. 3, Kentucky Statutes, which is section 30 of the act of the General Assembly commonly known as the Workmen's Compensation Act, being chapter 33, p. 354, of the Acts of 1916; and incidentally there is also involved the construction or rather the application, of sub-section 10 of section 331a to the provisions of the section first above mentioned, which is in these words:

"In case any minor employe who is injured or killed is, at the time of such injury, employed in willful and known violation by the employer, of any law of this state regulating the employment of minors, his statutory guardian or personal representative of the minor so killed, may claim compensation under the terms of this act or may sue to recover damages as if this act had not been passed. If a claim to compensation

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be made under this section, the making of such claim shall be a waiver and bar to all rights of action on account of said injury or death of said minor as to all persons, and the institution of an action to recover damages on account of such injury or death shall be a waiver and bar of all rights to compensation under this act."

So much of subsection 10 of section 331a referred to, which is a part of the statute commonly known as the Child Labor Law, as bears upon the question involved says:

"It shall be the duty of the owner of any manufacturing establishment where any person under twenty-one years of age is employed, his agents, superintendents or other persons in charge of same, to furnish and supply, when practicable, or cause to be furnished and supplied to him, belt shifters or other safe mechanical contrivance for the purpose of throwing belts on or off the pulleys; and, whenever practicable, machinery therein shall be provided with loose belts. All vats, pans, saws, planes, cogs, gearings, beltings, set screws and machinery of every description which is palpably dangerous, shall be properly guarded and no person shall remove or make ineffective any safeguard around or attached to any such appliances or machinery, while the same is in use, unless for the purpose of immediately making repairs thereto, and all such safeguards shall be promptly replaced."

Subsection 1 of section 331a names certain employments at which no child under 14 years of age may be employed, and provides that a child under that age may not be employed in any character of service while the public schools are in session in the district where it resides. Subsection 2 prescribes how a child between the ages of 14 and 16 may be employed at the places prohibited in subsection 1 by procuring a certificate from the authority therein designated; while subsection 9 expressly forbids the employment of infants under 16 years of age to do certain classes of work, or work at certain machinery therein designated, although the certificate provided by subsection 2 may have been obtained.

The questions presented arise in this way: Appellant and plaintiff, Harvey Frye, who sues by his statutory guardian, A. F. Dyer, was employed by the appellee and defendant, Gamble Bros., a corporation, to work in its planing mill used in connection with its business of wholesale lumber dealer. He sustained injuries to his hand while working at a planer or joiner, and he brought this suit to recover damages therefor, alleging in substance that he was under 16 years of age at the time of his employment, as well as at the time of his injury, and that he was put to work at one of the machines or places mentioned and prohibited in subsection 9, supra; that he was thereby, at the time of his injury, "employed in willful and known violation by the employer" (the defendant) of the statute in this state "regulating the employment of minors," which, as he contends in his petition, authorized his guardian to elect to sue for his injuries in a court of law instead of applying for and accepting compensation under the Workmen's Compensation Act, as provided by section 4911, supra, the terms of which act had been accepted by both parties in the manner provided therein, and under which the plant of the defendant was being operated at the time.

It was also averred in the petition that the machinery at which plaintiff was working at the time he sustained his injuries was dangerous; that it was not guarded in the manner provided in subsection 10 of section 331a, supra, and it is insisted that the failure of the defendant to so guard it constituted such an employment of plaintiff "in willful and known violation" of the statute pertaining to the employment of minors as is contemplated by section 4911, supra, and that his guardian was thereby authorized by that section to elect to sue for his injuries rather than accept compensation under the Workmen's Compensation Act, al-

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though plaintiff may have been, at the time of his employment, or at the time of his injury, over 16 years of age.

The court struck from the petition the latter allegation with reference to the machinery being unguarded in violation of the provisions of subsection 10, and sustained a demurrer to the petition, which, upon plaintiff's declining to plead further, was dismissed, and complaining of these rulings of the court plaintiff prosecutes this appeal.

The ground upon which the court sustained the demurrer to the petition was that the Legislature intended by the enactment of section 4911 to provide that before the election by the guardian of the infant, or in case of his death by his representative, to sue as therein permitted, the Compensation Board must first determine the facts upon which the right of electiton depended, to wit, the employment of the infant "in willful and known violation" of the Child Labor Law under a reference to it for that purpose, after which the guardian or representative, as the case might be, might exercise such right, and that the finding by the board of such precedent fact would be conclusive upon the parties to any suit which the guardian or represenative might thereafter institute. In other words, the court held that it was the intention of the Legislature in enacting section 4911 to withhold from the guardian or representative of the infant the right to determine for himself the existence of the facts authorizing the election, and to lodge that right exclusively with the Compensation Board, whose finding thereon would be conclusive in any subsequent suit.

[1, 2] The argument of the court, as well as the attorneys for appellee, in support of that construction, is in substance that Workmen's Compensation Laws were intended to remedy many existing evils with reference to the remuneration of injured servants, and that they should be broadly and liberally construed so as to effectuate the purpose of the Legislature in their enactment; that, since the election by the guardian or personal representative of the infant to sue under section 4911 is a waiver of any right to subsequently claim compensation under the act, it was not intended by the Legislature that such far-reaching consequences affecting the interests of the infant employe should be entrusted to the individual determination of such fiduciaries. That the premise for the conclusion reached by the court is true, i. e., that such statutes should receive a broad and liberal construction, there can be no doubt. Young v. Duncan, 218 Mass. 346, 106 N. E. 1; In re Petrie, 215 N. Y. 335, 109 N. E. 549; City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W 188, L R. A. 1916A, 1, Ann. Cas. 1915B, 847; Foth v. Macomber & Whyte Rope Co., 161 Wis. 549, 154 N. W. 369; and Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152. But, howsoever worthy the end to be accomplished, courts cannot amend statutes under their power to liberally construe them. Such power of amendment is possessed only by the Legislature, and to that authority the salutary reasoning of the court, and the like argument of the counsel in this case, might be appropriately addressed.

The term "construction" necessarily presupposes some doubt, obscurity, or ambiguity, and where these elements or any of them exist to such an extent as to afford grounds for different constructions, under the rule, supra, that one will be adopted which will effectuate the purpose of the Legislature in the enactment of the statute. But where the wording of the statute is plain, and susceptible of but one meaning, there is no room for construction, and the meaning expressed by the words employed must be adopted, although such adoption might result in a failure to accomplish the full purpose the Legislature had in view in enacting it.

Hence, in the case of Western & Southern Life Insurance v. Weber, 133 Ky. 32, 209 S. W. 716, where this court had under consideration the construction of section 679 of our present statutes, it was said in the course of the opinion, quoting from Robertson v. Robertson, 100 Ky. 696, 39 S. W. 244:

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"When a statute is plain and peremptory there is nothing for the court to do but to enforce it as it is written."

Again quoting from Sutherland on Statutory Construction, § 366, it is therein said:

"Even when the court is convinced that the Legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity."

Still further along in that opinion this language is used:

"The judiciary is but one of the three component parts of our form of government. Its duty is to interpret and construe laws, not to enact them, and if a plainly warranted construction of a statute should result in a failure to accomplish in the fullest measure that which the Legislature had in view, the remedy is legislative action and not judicial construction."

In the case of Bosley v. Mattingly, 14 B. Mon. 89, this court, in discussing the same question, in its opinion delivered by Judge Simpson, said:

"It may be proper, in giving a construction to a statute, to look to the effects and consequences, when its provisions are ambiguous, or the legislative intention is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative and not judicial action."

See, also, Endlich on the Interpretation of Statutes, §§ 127 and 128, and the late case of Sewell et al. v. Bennett et al., 187 Ky. 626, 220 S. W. 517.

[3] In the light of these authorities, we find ourselves unable to agree with the learned judge who tried this case, or with counsel for appellee. To so construe section 4911 as to require the reference of the case to the Compensation Board for it to determine the existence of the facts upon which depends the right of election by the guardian or representative of the infant as therein provided for, and to make the determination of those facts by the board conclusive upon the parties in a subsequent suit brought in the exercise of that right, would inject something in the statute which clearly cannot be gleaned from any language employed therein and according to our view would be tantamount to an amendment. Not only do we fail to find room for any such interpretation from the language employed, but to adopt it would actually render nugatory that part of the statute saying "or may sue to recover damages as if this act had not been passed."

If the construction by the trial court should prevail, a suit brought by the guardian or personal representative of the infant, after the Compensation Board had determined the existence of the facts authorizing such a suit, would be only for the purpose of assessing damages, and it would not be one brought "as if this act had not been passed," for in a suit so brought all issues necessary to enable the plaintiff to recover, including the wrongful employment of plaintiff, would have to be established if denied. We therefore conclude that under the provisions of section 4911 the right to determine the existence of the requisite facts authorizing an election to sue, or accept benefits under the act, rests with the guardian of the infant if he is injured, or with his representative if he should be killed, and that the construction to the contrary adopted by the court below is erroneous.

[4, 5] The next and last question for determination is the correctness of the court's ruling in striking certain averments from plaintiff's petition. One of them was to the effect that the employment of plaintiff by defendant was made without obtaining or procuring an employment certifi-

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cate as required by the statute. Another was that plaintiff was permitted and suffered to work at machinery and appliances that were dangerous to life or limb without previously obtaining a decision of the county physician or city health officer as to the dangerous character of such appliances or machinery, as required by classification 24 in subsection 9 of section 331a, supra. The reasons for striking such allegations do not appear anywhere in the record. If the contract of employment of plaintiff was willfully and knowingly made by the defendant in the manner alleged, it would clearly present a case authorizing the maintenance of the suit under the right of election given by section 4911, supra. But the stricken allegations do not contain the words "willfully" or "knowingly," and it was perhaps on account of this omission that the allegations were stricken. If those words had been inserted, the allegations would have been proper, and should have remained in the petition.

Another allegation of this petition which was stricken by the court avers the failure on the part of the defendant to observe the imposed duties under subsection 10 of section 331a. The propriety of this ruling presents a more serious question. That question is whether the failure to observe such extra imposed duties constitutes an employment of the infant "in willful and known violation" of the statutes relating to the employment of infants. If so, in every case where the injured employe is an infant, his guardian, where he was not killed, or his representative if he was killed, could allege a violation of the duties imposed by the subsection under consideration, and thus take the infant's case from under the operation of the salutary provisions of the Workmen's Compensation Act. We do not believe that it was the intention of the Legislature that section 4911 should receive this latitudinous construction. That there is a difference between the consequences of an act which is absolutely prohibited by statute, and the consequences of negligently doing that which is permitted, is well settled. In the one case the wrongdoer may be amenable both criminally and civilly, while in the other ordinarily only civil liability attaches. But in any event all recognized defenses to the civil action in the latter case are usually available to the defendant.

This difference is pointed out in the case of L., H. & St. L. Ry. Co. v. Lyons, 155 Ky. 396, 159 S. W. 971, 48 L. R. A. (N. S.) 667. In that case an infant was injured while employed at a service prohibited under subsection 9 of section 331, supra; he being under 16 years of age at the time. The defenses of assumed risk, fellow servants, and contributory negligence were disallowed to the defendant by the trial court, and upon appeal that ruling was urged as one of the grounds for reversal. It was insisted on behalf of the appellant that it was not deprived of the right to rely upon the defenses named merely because it employed plaintiff in violation of the provisions of the statute, and it cited as an instance the statute requiring the operators of mines to furnish various safety appliances, such as posts, etc., and called attention to the fact that in suits by employes in and about mines against their employers, the defenses contended for were allowed. But this court, in rejecting that argument and pointing out the difference between the case then in hand and the instances relied on, said:

"These statutes, however, while they have increased the liability of the mine owner, do not decrease the obligation the miner is under to exercise care for his own safety. They do not prohibit the employment of miners in places that the mine owner has not protected with the safety devices required. They only put upon the mine owner a higher duty than the common law would impose.

"But the child labor statute prohibits the employment of children. It is unlawful to employ them, and the fact that it is unlawful to employ them is the reason why the employer who violates the statute should not be permitted to shield himself from his own wrong by setting up a defense that the child and not himself caused the accident. Except for

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his unlawful act in employing the child he could not have been injured, and the employer should not be permitted to take advantage of his own unlawful act by putting the consequences on an innocent party."

The employment of an infant between the ages of 14 and 16, provided a certificate is obtained at any of the places, or in any of the services mentioned in subsection 10 of section 331a, or the employment of him without such certificate between the ages of 16 and 21 at such places, is not prohibited by the statute. Its provisions only put upon the employer "a higher duty than the common law would impose." A failure, therefore, to observe such higher duty would not, according to our view, constitute an employment in violation of the Child Labor Law as contemplated by section 4911 of the statutes. We therefore conclude that the allegation relying upon such violations was properly stricken from the petition.

Wherefore the judgment is reversed, with directions to set aside the order dismissing the petition, and for proceedings consistent with this opinion.

WEST KENTUCKY COAL CO. v. SMITHERS

(Court of Appeals of Kentucky. May 18, 1920.)

221 Southwestern Reporter 558.

3. MASTER AND SERVANT—EMPLOYER NOT ELECTING TO COME UNDER COMPENSATION ACT CANNOT URGE CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK.

An employer electing not to come under the Workmen's Compensation Act cannot, under Ky. St. Supp. 1918, § 4960, offer as a defense to an employe's action for injury either the defense of contributory negligence or assumption of the risk.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

Appeal form Circuit Court, Union County.

Action by Ed. Smithers against the West Kentucky Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

P. A. Winston, of Sturgis, and Allen, Harris & Allen, of Morganfield, for appellant.

Truman Drury, G. L. Drury, and G. E. Jones, all of Morganfield, for appellee.

HURT, J. This is the second appeal from judgments in this action. The opinion of this court upon the former appeal may be found in 184 Ky. 211, 211 S. W. 580, and also in that opinion may be found a statement of facts out of which the action grew, and which are the basis of the appellee's claim for damages. After the cause was remanded to the trial court, another trial was had which resulted in a verdict for the appellee, as upon the first trial, and a judgment of the court accordingly. The appellant now insists upon a reversal of the judgment upon the sole ground that the court erred to the prejudice of its substantial rights in denying its motion for a directed verdict in its favor at the close of appellee's evidence in chief and at the close of all the evidence. The argument by appellant to sustain its contention is that it did not fail to per-

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form any duty which it owed to appellee, and for that reason was not guilty of any negligent act as to him which resulted in his injury.

[1] As a matter of course, if appellant did not owe appellee any duty which it failed to perform, and such failure was the proximate cause of his injury, the verdict as a matter of law should have been for the appellant. The rule is universal that, where there is no duty, there can be no negligence. The appellee was a track layer in a coal mine operated by the appellant, and, while riding from the interior of the mine toward the entrance upon a loaded car, a dozen or 15 empty coal cars escaped from the lieway or side track, where they should have been held, until the loaded cars had arrived at that point, so that no collision could occur between them and the empty cars running down the track, which was there upon a declining grade, collided with the car upon which appellee was riding with such force that he was thrown from the car, and the car upon which he was riding was then forced by the contact over his body, dislocating his hip and otherwise severely injuring him. The evidence tended to prove that the cause of the escape and running away of the empty cars was a failure of the mine foreman to exercise care to see that the devices maintained for preventing the cars from running away upon inclines were in working order and applied to the empty cars, so as to securely hold them.

[2] Whether appellant was negligent in permitting the empty cars to escape and run down the track was an issue in the pleadings and evidence, and was properly submitted to the jury.

[3-5] It is, however, insisted by the appellant that, though it may have owed to the driver of the loaded car the duty of taking proper precautions to protect him from a collision with a trip of empty cars, it did not owe the appellee any such duty, as he had no connection with the operation of the cars, nor any business thereon, and, in addition thereto, there were practical routes other than the one upon which appellee was traveling when he was injured, and which he might have taken to go out of the mine, and thus escaped injury. The appellant is one of those employers affected by the act of the General Assembly, known as the Workmen's Compensation Act, and embraced in chapter 137 of Ky. Statutes, vol. 3, and by the provisions of section 4960, Ky. Statutes, vol. 3, is denied the right to offer, as a defense to an action for damages for the injury of one of its servants through its negligence, either the contributory negligence of the servant or his assumption of the risk by reason of not having elected to operate under such act, and hence the only issues in this action were whether the appellant's negligence caused the injury, and whether the appellee was a person to whom it owed a duty of taking care to prevent the empty cars from escaping and colliding with the car upon which he was riding. It was held upon the former appeal of this action that, although the appellant might be negligent in failing to prevent the empty cars from running down the grade and colliding with the loaded cars as to drivers of the loaded cars, it would not be an act of negligence as to appellee unless he had a right to be on the car at the time of the injury, and the factor which determines whether the appellee had a right to be on the car where he was injured was whether it was a custom in the mine for employes not connected with the operation of the cars to ride on the loaded cars with the knowledge of the persons in charge of the mine, in going in or out of or about the mine. There was proof tending to support the contention that such custom existed, while there was also proof that such custom did not exist, and this issue was properly submitted to the jury, and the right of appellee to recover was predicated upon the finding of the jury that such a custom did exist; for, if such custom existed, it was then the duty of those in control of the mine to anticipate the presence upon the loaded cars of employes other than those connected with the operation of the cars, and hence it owed such employes the duty of taking the necessary precautions to protect them from injury.

The judgment is therefore affirmed.

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McCLINTIC-MARSHALL CO. v. O'LEARY. (No. 22366).

(Supreme Court of Louisiana. Apirl 5, 1920, Rehearing Denied May 3, 1920.)

84 Southern Reporter 503.

(Syllabus by the Editorial Staff.)

2. MASTER AND SERVANT—NEGLIGENT THIRD PARTY, SETTLING WITH EMPLOYE, ACQUIRES NO RIGHT BY SUBROGATION AGAINST EMPLOYER.

As the Employer's Liability Act subrogates the employer to any rights the employe has against the person whose negligence causes an injury, such third person's claimed right of subrogation to the rights of the employe with whom it settled could not benefit it in a suit against the employer on an alleged agreement of indemnity.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by the McClintic-Marshall Company against John P. O'Leary. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Richard B. Montgomery and Lemle & Lemle, all of New Orleans, for appellant.

T. Semmes Walmsley and P. M. Milner, both of New Orleans, for appellee.

DAWKINS, J. John Ibos, an employe of defendant, sued the plaintiff, McClintic-Marshall Company, in the United States District Court, under article 2315 of the Code, for personal injuries alleged to have been received through its fault and negligence. The latter called the present defendant, John P. O'Leary, in warranty on an alleged agreement of indemnity. O'Leary filed an exception of no cause of action, which was sustained by the District Court, and defendant's demands against the warrantor were dismissed. On appeal to the federal Circuit Court of Appeals, the judgment of the lower court was amended by adding the words "without prejudice" to the dismissal of the warrantor. Thereafter the McClintic-Marshall Company compromised the suit of Ibos for $8,000, and the present suit is for the recovery of this sum under the alleged agreement of indemnity with O'Leary.

Defendant herein pleaded the judgment of the federal court as res judicata, and, in the alternative, that plaintiff's petition disclosed no cause or right of action. The former was overruled and the latter was sustained by the court below, and McClintic-Marshall Company prosecutes this appeal.

Defendant neither appealed, nor answered the appeal of plaintiff; hence the plea of res judicata is not before us for review.

Exception of No Cause or Right of Action.—The petition incorporates at length the allegations of Ibos' suit against plaintiff in the federal court, and, as the basis of recovery against O'Leary, there are attached and made part thereof the following letters, which passed between plaintiff and defendant prior to the occurrence in which Ibos was injured, to wit:

"New Orleans, La., 4/30/15.

"Jefferson Construction Company, New Orleans, La.—Gentlemen: We wish to call your attention to the fact that we will not assume responsibility for accidents or injuries to your workmen when working at points

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under our work, nor when your men are working among our workmen. The nature of our work is such that it is impossible to take sufficient precaution to absolutely prevent any injury to other workmen. If you desire to have your men at these points where structural steel erection is being carried on, you will have to assume the entire responsibility for injuries to them. "Yours very truly,

McClintic-Marshall Company,
"A. G. Hufford, Foreman."

Defendant's reply was as follows:

"New Orleans, La., May 1, 1915.

"Mr. A. G. Hufford, Foreman, McClintic-Marshall Co., New Orleans, La.—Dear Sir: Beg to own receipt of yours of the 30th, with reference to responsibility for accidents or injuries to our men, and in reply beg to say that all of our men are covered by our policies, whether hurt by your work or our own. "Yours very truly,

"Jefferson Construction Co.,
"By J. P. O'Leary."

And, in amplification of the alleged liability of O'Leary (sued as the sole proprietor of the Jefferson Construction Company), in virtue of said exchange of letters, the petition further alleges:

"Tenth. That under said letters, copies of which have heretofore been annexed, and further as set forth in said petition of John Ibos, and by reason of the acts of said John P. O'Leary in going ahead with said work after due warning, said John P. O'Leary is justly and truly indebted unto your petitioner for said eight thousand dollars ($8,000.00), which said amount was justly due and owing said Ibos, and which said payment and the accident giving rise to said damages and said damages were fully covered by said letters and by the undertaking of said O'Leary to hold petitioner harmless for any accidents or injuries to said John P. O'Leary's men while working under and about the work of your petitioner, and further by reason of the fact of said John P. O'Leary's taking advantage of said understanding in said letters, and by his going ahead with his work in the manner protested against in said letters, and for his own benefit and advantage.

"Eleventh. That further in said letters petitioner clearly notified John P. O'Leary that it would not go on with its work unless said John P. O'Leary would assume the responsibility of injuries to his men, due to their working under and about the work of the McClintic-Marshall Company, which was to be of short duration; that the reply by the said John P. O'Leary in effect guaranteed to petitioner that it should go on with its work and would be held harmless for any injuries to the employes of the said O'Leary; that, relying on said guaranty of the said O'Leary, petitioner did continue with the said work, which otherwise it would not have done; and that, the said O'Leary having induced and allowed petitioner to go on with his work under the belief that it was amply protected for any injury to any employe of the said O'Leary, said John P. O'Leary is estopped from denying liability to petitioner for injury caused by it to the said John Ibos, growing out of said work, which estoppel is hereby specially pleaded."

[1, 2] These averments, when analyzed, disclose merely the conclusions of the pleader as to the effect of the letters quoted, for it is not alleged that any other act or thing was done to mislead the plaintiff than the writing of the letter with reference to the insurance and the continuance of the work in the manner that had been complained of. The allegations of Ibos in the federal court, as incorporated in the petition here, are to the effect that he (Ibos) was employed by O'Leary, who was engaged in doing the stone and brick work on a certain building, and that he was injured as the result of the negligence of the McClintic-Marshall Company, who was doing the structural steel work on the same premises.

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Plaintiff further sets forth that, in its call in warranty in that suit, it notified the "general contractor" (Jefferson Construction Company) that it (McClintic-Marshall Company) would not be responsible for injuries occasioned under the circumstances which are now set up in the present case, and attached to the call were the same letters now alleged as the basis of recovery in this suit. Hence it remains that, whatever may be the allegations, in either case, we are compelled to return to these letters for the ascertainment of the legal rights of the parties. It is true that plaintiff alleges full subrogation to all rights of Ibos against O'Leary, but there is no charge of negligence on the part of the latter; and, even if claim were made under the employers' liability statute (Acts 1914, No. 20), which is not done (this law providing the full measure of Ibos' rights against his employer), since that law, itself, would have subrogated O'Leary, the employer, to any rights which Ibos, the employe, may have had against the present plaintiff for negligence, had compensation been paid under said statute, we cannot see how plaintiff's alleged subrogation from Ibos can benefit it in this case.

[3] The letter from plaintiff to defendant, of date April 30, 1915, consists of three sentences:

First: "We wish to call your attention to the fact that we will not assume responsibility for accidents or injuries to your workmen when working at points under our work, nor when your men are working among our workmen."

This was a declaration that the plaintiff was unwilling to and would not assume the liability which the law might impose upon it to employes of defendant under the circumstances mentioned. Such a declaration, of course, did not and could not relieve it from liability, if the work were continued under the conditions complained of, where injuries were inflicted through its own fault or that of its employes. The best that may be said of it is that plaintiff was unwilling to have defendant's employes continue to work in those circumstances.

Second: "The nature of our work is such that it is impossible to take sufficient precaution to absolutely prevent any injury to other workmen."

The statement was merely an assertion of the hazardous nature of the work being performed.

"Third: "If you desire to have your men at these points where structural steel erection is being carried on, you will have to assume the entire responsibility for injuries to them."

Assuming that the nature of the work and the relations of the parties were such that the plaintiff would have had the right to prevent a continuance under the circumstances complained of, the sentence last quoted was a demand that, if defendant wished to continue, he should become solely responsible for such injuries as might occur to his employes, whether through plaintiff's negligence or otherwise, and that plaintiff be protected against the same. But the question is: Did defendant accede to that demand to the extent contended for by plaintiff? There can be little doubt as to the desire and purpose of plaintiff, and, if the defendant had met the demand in plain terms, or in language which was reasonably susceptible of such intention, there could be no question of plaintiff's right to recover.

However, the reply was:

"Beg to own receipt of yours of the 30th, with reference to responsibility for accidents or injuries to our men, and in reply beg to say that all of our men are covered by our policies, whether hurt by your work or our own."

Granting that this statement was true, and that defendant and his employes were protected against injuries, whether resulting from acts of the one or the other, this reply did not say, either in exact words or by

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the use of language from which such a conclusion could reasonably be drawn or implied, that plaintiff would be protected by said policies against its own faults. If nothing were concealed, and no misrepresentations made as to the policies, plaintiff was bound to know that under ordinary circumstances a policy held by defendant and covering his employes would not necessarily and ordinarily protect it, a third person, since defendant's liability was fixed and limited by the employers' liability law, and the duty was upon plaintiff to pursue the inquiry further, and to have seen that the indemnity against liability which it sought of defendant was provided. It is not alleged that the policies as represented by defendant were not held by it.

Plaintiff's predicament results from an erroneous assumption on its part that it would be protected by said policies, which was an error of fact and of law, not misrepresented by defendant, and for which there can be no relief in an action of indemnity, where the party sought to be held has in no wise obligated himself to make good the outlay. There was no meeting of minds to constitute a contract of indemnity, as required by law. C. C. arts. 1917, 1798.

For the reason assigned, the judgment appealed from is affirmed, at the cost of the appellant.

NICHOLAS v FOLSOM.

(Supreme Judicial Court of Maine. May 10, 1920.)

110 Atlantic Reporter 68.

1. MASTER AND SERVANT — ADMISSION BY MASTER IN AN ACTION FOR PERSONAL INJURIES HELD NOT TO RELIEVE SERVANT FROM PROVING DUE CARE.

In an action by a servant for personal injuries on a declaration stating a cause of action at common law, it was incumbent upon the plaintiff to prove, as he alleged, that he was in the exercise of due care at the time of injury, defendant having pleaded the general issue without a brief statement, although in the course of the trial it was admitted that defendant was at the time of injury "operating more than five workmen, and that he was not an assenting employer"; it being assumed, in the absence of an appropriate allegation, that defendant was a nonassenting employer.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

On motion from Supreme Judicial Court, Piscataquis County, at Law.

Action by Peter Nicholas against John J. Folsom. Finding in favor of plaintiff. On motion for new trial. Motion overruled.

Argued before Spear, Hanson, Morrill, Wilson, and Deasy, JJ.

Robert E. Hall, of Dover, and Percy L. Aiken, of Bangor, for plaintiff.

C. W. & H. M. Hayes, of Foxcroft, for defendant.

MORRILL, J. This is an action to recover damages for personal injuries received by plaintiff while in the employ of defendant, and is presented upon a motion by defendant for a new trial, in the usual form.

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The declaration, in a single count, states a cause of action at common law, and contains all allegations necessary to sustain such action, including an averment of due care on the part of the plaintiff; the defendant pleaded the general issue without a brief statement.

In Nadeau v. Caribou Water, Light & Power Co., 118 Me. 325, 331, 108 Atl. 190, 193, announced since this case was tried at nisi prius, it was held: (a) That in any case, regardless of the number of workmen employed, the employe injured by the negligence of a nonassenting employer may bring and maintain his common-law action, alleging due care on his part; he need not allege the employer to be nonassenting; an assenting employer who desires to avail himself of his exemption from liability at common law must plead and prove that he is entitled to such exemption; or (b) in cases where the suit is against a large employer, the injured employe may omit the allegation of due care on his part, but in such case the plaintiff should allege and prove that he is an employe of the defendant in a specified occupation, and that the defendant employs more than five workmen or operatives regularly in the same business in which the plaintiff is employed; (c) that the plaintiff must allege and prove, either that he was himself in the exercise of due care, or that defendant belongs to a class of employers in actions against whom the plaintiff's care is not material, i. e., regular employers of more than five workmen or operatives; that it is not inconsistent to join both allegations in separate counts in one declaration.

[1] Upon the authority of this recent case, it was incumbent upon the plaintiff to prove, as he had alleged, that he was in the exercise of due care at the time of the injury. In the course of the trial it was admitted that the defendant was at the time of the injury "operating more than five workmen, and that he was not an assenting employer." Obviously this admission did not relieve the plaintiff from the necessity of proving his own due care; the admission as to the number of workmen was immaterial, there being no allegation as to that fact; and, in the absence of an appropriate allegation by way of brief statement, it is assumed that the defendant is a nonassenting employer.

[2] But when the above admission was made, the presiding justice remarked:

"I shall instruct the jury that in such an action as this, and under the admission made just now, the negligence of the servant is not a defense."

No exception was taken to this ruling, the counsel for defendant remarking:

"We are not undertaking to claim and we are not arguing negligence as a defense."

The issue of plaintiff's contributory negligence was not therefore raised at the trial.

[3, 4] The issues submitted to the jury were the alleged negligence of defendant and whether that negligence, if shown, was the proximate cause of plaintiff's injury. We must assume that adequate and correct instructions were given to the jury; that the law of causal connection was fully explained to them; and we must consider the evidence entirely apart from any question of plaintiff's negligence. Upon a careful consideration of the evidence we cannot say that the jury were manifestly wrong in their conclusion. Whether the machine on which plaintiff worked was inadequate, whether the saw in use was or was not reasonably suitable for use, whether the teeth were broken, were questions sharply controverted before the jury. They were questions peculiarly for the jury; witnesses for both sides testified positively; and, there being evidence which, if believed, would sustain the plaintiff's contention of defendant's negligence, we ought not to interpose our own judgment. The issue

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of proximate cause is also one of fact, not of law, and it is to be submitted to the jury under proper instructions, unless the court can say with judicial certainty that the injury is or is not the natural and probable consequence of the act of which complaint is made. Bowden v. Derby, 99 Me. 208, 213, 58 Atl. 993; Lake v. Milliken, 62 Me. 240, 16 Am. Rep. 456; Lane v. Atlantic Works, 107 Mass. 104; note to Gilson v. Delaware, etc., Canal Co., 65 Vt. 213, 26 Atl. 70, in 36 Am. St. Rep. 807, 851; 1 Sedgwick on Dam. (6th Ed.) 55, 56. The jury has found that the broken condition of the saw was the proximate cause of plaintiff's injury; it cannot be said that the finding is so manifestly wrong as to warrant us in disturbing it.

Motion overruled.

HOLLAND MFG. CO. ET AL. v. THOMAS. (No. 12.)

(Court of Appeals of Maryland. Feb. 5, 1920.)

110 Atlantic Reporter, 209.

2. MASTER AND SERVANT—APPEAL FROM DECISION OF INDUSTRIAL COMMISSION UNDER COMPENSATION ACT HELD TOO LATE AND VOID.

An appeal entered 31 days after the decision of the Industrial Commission on a claim under the Workmen's Compensation Act, is too late, and the court obtains no jurisdiction; the language of Code Pub. Gen. Laws, art. 101, § 56, allowing 30 days, being mandatory.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

Appeal from Baltimore City Court; Henry Duffy, Judge.

Proceeding by Lillie Thomas under the Workmen's Compensation Act to obtain compensation for the death of her son, James Thomas, opposed by the Holland Manufacturing Company, the employer, and the New Amsterdam Casualty Company, the insurer. There was an order disallowing compensation, which was reversed on appeal to the Baltimore City Court, and the employer and insurer appeal. Judgment of city court reversed, and cause remanded.

Argued before Boyd, C. J., and Briscoe, Burke, Thomas, Urner, and Stockbridge, JJ.

J. Richard Wilkins and Aubrey Pearre, Jr., both of Baltimore (Stewart & Pearre, of Baltimore, on the brief), for appellants.

Lawrence S. Kaufman, of Baltimore (Kaufman & Kaufman, of Baltimore, on the brief), for appellee.

BURKE, J. James Thomas, an employe of the Holland Manufacturing Company, while engaged in the course of his employment with that company, was caught in a certain part of the machinery of the company and was instantly killed. His mother, Lillie Thomas, the appellee, filed a claim for compensation, upon the ground of dependency, with the State Industrial Accident Commission, and that body, on June 14, 1918, after hearing, passed an order disallowing her claim. On July 15, 1918—31 days after the decision—the claimant entered an appeal from the action

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of the commission. The case was tried before a jury in the Baltimore city court and resulted in a verdict for the claimant, and on August 4, 1918, the court entered a judgment reversing the decision of the commission and remanding the case to the end that compensation may be awarded to the claimant, Lillie Thomas, in accordance with the provisions of article 101 of the Code of Public Laws of Maryland. The appeal before us was taken by the employer and the insurer from that judgment.

[1] The question which arises upon the facts stated—and about which there is and can be no dispute—is this: Had the Baltimore city court jurisdiction to hear and determine the case? If it had no jurisdiction, its judgment is a mere nullity and must be reversed. A judgment rendered without jurisdiction is coram non judice, and the question of jurisdiction may be raised by motion to quash, by a motion in arrest of judgment, or in any other appropriate way, or without making the objection in the court below, which was not done in this case—it may be relied on in this court upon appeal. This is the settled law of this state. U. S. Express Co. v. Hurlock, 120 Md. 107, 87 Atl. 834, Ann. Cas. 1915A, 566, and cases there cited.

[2] Section 56 of article 101 of the Code, relating to appeals from the decisions of the State Industrial Accident Commission, declares that—

"No such appeal shall be entertained unless notice of appeal shall have been served personally upon some member of the commission within thirty days following the rendition of the decision appealed from."

This language is positive and mandatory, and we have no power to disregard it. It was evidently intended to secure expedition in the review of the decisions of the commission, and to forbid the hearing of such appeals unless taken within the time limited.

It follows that the judgment appealed from must be reversed, and the case remanded in order that the lower court may dismiss the appeal taken by the claimant from the decision of the commission.

Judgment reversed, with costs, and case remanded.

PIMENTAL'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. May 22, 1920.)

127 Northeastern Reporter, 424.

1. MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW PAIN WAS REASONABLY NECESSARY RESULT OF EMPLOYMENT.

In proceedings for compensation by a cigar maker claiming to have occupational neurosis, evidence *held* insufficient to sustain finding that pain to which employee was subjected had been a reasonably necessary result of employment, so that it was an injury peculiar to it.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW CIGAR MAKER HAD OCCUPATIONAL. NEUROSIS.

In proceedings for compensation by a cigar maker claiming to have occupational neurosis, evidence *held* insufficient to warrant finding that

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employee had neurosis, or any disease; reasonable inference being neuralgic pain was due to faulty posture brought about by long labor, a condition equally liable to arise in any or no employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT—NEURALGIC CONDITION FROM FAULTY POSTURE HELD NOT TO ARISE FROM EMPLOYMENT.

A painful neuralgic condition in an employee due to faulty posture of the body in his work as a cigar maker was not a condition arising from his employment, though it arose during such employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

4. MASTER AND SERVANT—COMPENSATION ACT DOES NOT COVER OCCUPATIONAL "DISEASE"; "PERSONAL INJURY."

The Workmen's Compensation Act does not cover disease contracted by employees in the course of and arising out of their employment, pain not being a disease, and disease resulting in pain not being a personal injury.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Disease: Personal injury.)

5. MASTER AND SERVANT—COMPENSATION ACT EXTENDS ONLY TO CASES REASONABLY WITHIN SCOPE.

While the Workmen's Compensation Act should be liberally construed, it should not be extended to cases which cannot reasonably be interpreted as within its scope.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

Appeal from Superior Court, Suffolk County.

Proceedings for compensation under the Workmen's Compensation Act by Moses Pimental, the employee, opposed by the Alles & Fisher Cigar Company, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer. Compensation was awarded, the award affirmed by the superior court, and the insurer appeals. Decree reversed, and decree entered for the insurer.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

Paul L. Keenan and Albert Z. Lemoine, both of Boston, for appellee.

CROSBY, J. The employe is a cigar maker and worked continually at his trade for 14 or 15 years. Early in the year 1918 he began to have pain in the region of the back of his neck, and in February or March, 1919, he consulted a physician who told him that he had occupational neurosis. on May 2, 1919, he was obliged to give up his work.

William J. Daly, the impartial physician, testified:

That the employe had "an undeveloped left side, a shortened left leg with sinuses from old pus processes about the left buttock and the anterior surface of the hip, * * * a faulty posture both in standing and sitting, * * * distortion of the spinal column * * * [the result] of faulty posture, [and] a malformation of the thoracic bone cage"; that "all this distortion and malformation had the effect of producing bony pressure on the spinal nerves, * * * so that when the loading upon this region, incident upon the muscular action in rolling cigars, took place, after a number of years, it produced neuralgic pain. * * * In consequence of

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his working and using the movements he did his work as a cigar maker was a certain consequence of causing his condition. In the first place he sits faulty; his left buttock being undeveloped, his left pelvis sags. He does not sit evenly on the buttocks. In that way he crowds the vertebra unevenly in the other parts of the spine, so that any sitting occupation could contribute to the brachial pain. * * * In a man with no asymmetry, who was in a fair state of nutrition, this condition probably never would develop. * * * The particular movements which produce this condition are the rolling process at the end of the making of a cigar, whereby a weight of the forearm, the arm, and some of the shoulder and shoulder girdle are brought down upon the cigar in order to make a firm wrapper."

He further testified:

"He was of opinion that if the employe had a sitting down job where there was no muscular loading or tension, as in the rolling process, he might have supported the condition of his spine for years longer without trouble. He believed that the upset factor in the thing was the muscular tension and the loading incidental upon the rolling movements. * * * That the employe's condition would come on or did come on quicker because he rolled cigars than it would have had he worked at any other sitting down occupation. * * * He thought that the rolling movements are the movements which brought about the pain. * * * This employe has not neuritis."

Further:

"He thought that if the employe assumed a different posture by putting a pad under his left hip, and by raising the table at which he worked, he would go along 'all right.' * * * In his opinion, any sitting occupation is likely to cause the neuralgic pain which this employe experienced in the region of his neck. If he sat for eight hours a day in his home reading a book 'with his hip in that position, in any position,' he would be likely to have the same sort of a pressure in that brachial region as he had while sitting at work. If he sat in a chair at his home over a period of fourteen years, reading a book every day, he might get from that the neuralgic pain which he experienced in March of 1919."

Another physician testified:

That he had examined the employe, and that "he did not see how his occupation could produce his condition. This employe's occupation involved chiefly the use of his arms, and his arms were free from all trouble. * * * This employe's condition is not in the muscles; it is in the skin, as far as he could determine; * * * that occupational neurosis is due to the action of muscles used in the occupation. * * * He was of the opinion that there was a mental situation in this case. * * * He attributed this employe's condition to the combination of a mental attitude and a skin sensation."

The single member found:

That "while there was an underlying and preexisting condition, following hip disease, it was the muscular action in rolling cigars for a number of years which precipitated the neuralgic pain and brought into being the personal injury which totally incapacitated the employe for work," and that "finally, as a result of the effect of the muscular movements required by his employment in making cigars, acting upon his peculiar condition of health, neuralgic pain, a personal injury under this act, developed. The employe's total incapacity for work is due to that personal injury and will continue for a period which is not now determinable."

He also found that the employe was entitled to compensation under the act. On the same evidence the Industrial Accident Board adopted the findings and rulings of the single member.

[1-3] The case at bar is similar in many respects to Maggelet's Case,

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228 Mass. 57, 116 N. E. 972, L. R. A. 1918F, 864, and is governed by it. While the board found that the neuralgic pain was induced by muscular action in rolling cigars for a number of years, the impartial physician testified that any other occupation was likely to cause the pain from which the employe suffered, and that this condition could result independently of any occupation, and could come from any sitting or standing occupation. In view of this, together with all the other evidence, we are of opinion that the pain could not have been found to have been a reasonably necessary result of the employment, and cannot be said to have been a personal injury peculiar to it. We are also of opinion that there was no sufficient evidence to warrant a finding that the employe had neurosis—a disease with which cigar makers are sometimes afflicted—and the impartial physician so testified; nor is there evidence that he had any disease, the reasonable inference being that the neuralgic pain was not due to his occupation, but was rather the result of faulty posture brought about by long and laborious work, a condition which would have been equally liable to arise in whatever employment he might have been engaged, or if not employed at all. McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Donahue's Case, 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A, 215. Although the condition arose during the course of the employment, it cannot be found to have arisen from it.

"A nervous condition dependent upon poor posture of the body in our opinion does not constitute a commonly known and well-recognized personal injury consequent upon employment. * * * But personal injury and disease are not synonymous. They are different in meaning. One does not include the other." Maggelet's Case, 228 Mass. 57, 61, 62, 116 N. E. 972, 974 (L. R. A. 1918F, 864).

[4] If it could be held that the employe was suffering from an occupational disease, still the Workmen's Compensation Act does not in terms include disease. See St. 1913, c. 813, § 12. It cannot be held to cover disease contracted by employes in the course of an arising out of their employment. Pain is not disease, nor is disease resulting in pain a personal injury.

In Hurle's Case, 217 Mass. 223, 104 N. E. 336, Ann. Cas. 1915C, 919, L. R. A. 1916A, 279, Johnson's Case, 217 Mass. 388, 104 N. E. 735, and Doherty's Case, 222 Mass. 98, 109 N. E. 887, there was evidence that the employe was suffering from poisoning arising from the performance of his work. Poisoning has generally been regarded as in the nature of a personal injury (H. P. Hood & Sons. v. Maryland Casualty Co., 206 Mass. 223, 92 N. E. 329, 30 L. R. A. [N. S.] 1192, 138 Am. St. Rep. 379), but the doctrine of those cases which dealt with disabilities in the nature of personal injuries cannot be held to apply to the present case. The language in the opinion in Johnson's Case, supra, is to be limited to the precise facts in that case and is not an authority in favor of the contention of the employe in the case at bar.

[5] While the act should be construed liberally, it should not be extended to cases which cannot reasonably be interpreted as within its scope. The statement in Maggelet's Case, supra, 228 Mass. at page 61, 116 N. E. at page 973, L. R. A. 1918F, 864, that "No case has gone so far as to hold that a 'neurosis of the nerves' supplying certain muscles, resulting from a posture which causes the employe 'to bend forward with shoulders forward' so as to induce 'pressure on the brachial plexus' is a personal injury," applies in principle to the case at bar, although the employe is not suffering from neurosis, and notwithstanding the finding of the board that as a result of the muscular movements required in rolling cigars acting upon this particular condition neuralgic pain developed. It follows that the decree must be reversed, and a decree entered in favor of the insurer.

So ordered.

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STATE EX REL. JOHNSON HARDWARE CO. ET AL. v. DISTRICT COURT OF CARVER COUNTY ET AL. (No. 21735.)

(Supreme Court of Minnesota. May 7, 1920.)

177 Northwestern Reporter, 644.

(Syllabus by the Court.)

1. MASTER AND SERVANT—THAT HODGKIN'S DISEASE RESULTED FROM ULCERATIONS CAUSED BY INHALING FUMES HELD NOT SHOWN BY EVIDENCE.

The evidence discloses no facts which will justify an inference that "Hodgkin's disease," from which the employee died, resulted from ulcerations in the mucous membrane of his nose, or that those ulcerations were caused by inhaling the fumes of hydrochloric acid used by him in his work as a tinner, and the findings to that effect rest wholly on conjecture.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—MAXIMUM AMOUNT ALLOWED IN 1918 TO DEPENDENTS OF DECEASED WAS $11 A WEEK.

In 1918 the maximum amount which the compensation law allowed to dependents in case of death was the sum of $11 per week.

(For other cases, see Master and Servant, Dec. Dig. § 386[1].)

3. MASTER AND SERVANT—FUTURE INSTALLMENTS UNDER COMPENSATION LAW DO NOT BEAR INTEREST.

Installments payable in the future do not bear interest.

(For other cases, see Master and Servant, Dec. Dig. § 391¼, New, vol. 10A Key-No. Series.)

Hallam, J., dissenting.

Certiorari from District Court, Carver County; C. M. Tifft, Judge.

Certiorari by the State of Minnesota on the relation of Johnson Hardware Company, employer, and others, to review an award under Workmen's Compensation Law, made by the District Court of Carver County, Eighth Judicial District, to the widow of Henry J. Hoernemann, deceased employee. Reserved.

K. A. Campbell and B. Burness, both of Minneapolis, for relators.
P. W. Morrison, of Norwood for respondents.

TAYLOR, C. Certiorara to review an award under the Workmen's Compensation Law (Gen. St. 1913, §§ 8195-8230), made by the district court of Carver county to the widow of Henry J. Hoernemann, deceased.

[1] Henry J. Hoernemann died from what is known as "Hodgkin's disease" on October 14, 1918. He had followed the occupation of a tinner and plumber for more than 20 years and was employed in the capacity by the relator, Hardware Company, at Hector, Minn., at the time he became ill. The trial court found that the disease which caused his death, known as Hodgkin's disease, resulted from ulcerations of the mucous membrane of his nose, and that these ulcerations were caused by inhaling the fumes of hydrochloric acid used by him while engaged in the performance of his duties as a tinner. The relators contend that there is no evidence whatever to sustain these findings.

Mr. Hoernemann became ill in the latter part of April, 1918, and

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consulted a physician of Hector, who first treated him for la grippe and later for Bright's disease. He removed with his family to the village of Norwood, and on June 2, 1918, consulted Dr. Eklund of that place, who made an examination and diagnosed his ailment as Hodgkin's disease. In this examination Dr. Eklund found two ulcerated spots on the septum of the nose, one of which had already healed. He also learned that before becoming ill Mr. Hoernemann had repaired two large water tanks, used for watering stock, by soldering the leaky places in them. The time when this work was performed was not fixed with any degree of certainty—one witness saying that it was while the snow was on the ground and another that it was later. At the trial, Dr. Eklund testified that in his opinion the ulcerations, which he found, were caused by inhaling the fumes of the hydrochloric acid used in these soldering operations, and also testified that in his opinion the Hodgkin's disease from which Mr. Hoernemann died resulted from these ulcerations. The findings challenged rest upon this testimony.

Hydrochloric acid, also called muriatic acid in the testimony, is constantly used by tinners in their soldering operations to clean the metal, and they frequently inhale fumes from it. It is conceded that these fumes are sterile, containing no disease germs and, so far as the evidence discloses, no deleterious effects result to the tinners from inhaling them. Mr. Hoernemann had used this acid in his work for more than 20 years and, so far as appears, never claimed to have suffered any injury or inconvenience from the fumes. The inhalation which is claimed to have caused the ulcerations in question occurred more than a month before the discovery of the sores. The doctor testified that he was unable to say how long those sores had existed and that they might have developed within two or three days after the injury or irritation which caused them. He stated that they may have been caused by inhaling dust or dirt or in many other ways. He also stated that in his opinion they might have been, and in this case probably were, caused by inhaling strong fumes of hydrochloric acid which burned the membrane, but admitted that he had never known of such a case although he had known of many instances in which such fumes had been inhaled.

The medical experts on both sides state that Hodgkin's disease is a disease of the lymph and lymphatic glands; that it is not of germ origin so far as known; that what causes it has not yet been discovered; that no remedy or cure for it has yet been discovered; and that it is progressive and fatal, although in some cases its progress may be arrested for a time by radium treatment. Although Dr. Eklund stated each time the question was asked that it was his opinion that Mr. Hoernemann had contracted Hodgkin's disease from the ulcerations in his nose, the doctor also stated that he did not know the origin of that disease nor what caused it, and that this was the only case of that disease which he had ever found or treated in his practice. The relators presented testimony to the effect that the ulcerations could not have been caused by the fumes of the acid and that Hodgkin's disease could not have been caused by these ulcerations, but we have considered only the testimony of Dr. Eklund, as this is the testimony on which the claimant relies to sustain the findings.

Ulcerations in the nose are of frequent occurrence and result from innumerable causes. We find nothing in the record tending to point out in any manner the particular cause of the ulcerations in question. That the irritation or injury which produced them may have been caused in many different ways and may have occurred long after the soldering operations is evident from Dr. Eklund's testimony. He points out no reason for inferring that they resulted from one rather than another of the several causes which may have produced them. That acid fumes had been inhaled in soldering can hardly be considered a reason for attributing them to such fumes, for there is no evidence that they had their inception at or about the time of such inhalation, and no evidence that injury has ever resulted from inhaling such fumes under such circumstances although

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all tinners frequently inhale them. Dr. Eklund's statement that in his opinion Mr. Hoernemann became afflicted with Hodgkin's disease because of the ulcerations of the mucous membrane of his nose, when taken in connection with the doctor's further statement that he does not know how that disease originates nor what causes it, can be considered only as a mere guess. It is undisputed that medical science has not yet discovered how this disease is produced or what causes it, and no attempt was made to show that it follows traumatic injuries or that such injuries have any part in producing it. If the evidence had disclosed any facts from which a reasonable mind could legitimately infer a causal connection between the inhaling of the acid fumes and the disease which caused death, the finding of the trial court would be final. State ex. rel. Niessen v. District Court, 142 Minn. 335, 172 N. W. 133; State ex rel. Green v. District Court, 176 N. W. 155; State ex rel. Berquist v. District Court, 176 N. W. 165. But we are forced to the conclusion in this case that the evidence discloses no basis of fact for the findings in question, and that they rest wholly on conjecture and therefore cannot be sustained. Mageau v. Great Northern Ry. Co., 106 Minn. 375, 119 N. W. 200; Wendt v. Bowman, 126 Minn. 509, 148 N. W. 568; Ginsberg v. Burroughs Adding Mach. Co., 204 Mich. 130, 170 N. W. 15.

[2, 3] Although the above conclusion leads to a reversal, it may be well to mention that the amount awarded the widow exceeded the maximum amount allowable under the statute. Section 8208, G. S. 1913, as amended in 1915 (Laws 1915, c. 209, § 5 [Gen. St. Supp. 1917, § 8208]), fixes the compensation payable to dependents in the cases in which such dependents are entitled to compensation under the law. The court awarded the sum of $55 per month in accordance with subdivision 7 of this section, and apparently overlooked subdivisions 17 and 19 thereof which limit the amount allowable to such dependents in any case to the sum of $11 per week. The court also allowed interest on the monthly payments to be made in the future. We find no warrant in the law for allowing interest, before they become due, on installments which by the terms of the law are payable in the future.

Judgment reversed.

Hallam, J., dissents.

BROWN v. YORK WATER CO. (No. 21029.)

(Supreme Court of Nebraska. April 30, 1920.)

177 Northwestern Reporter, 833.

(Syllabus by the Court.)

MASTER AND SERVANT — POWER OF REVIEWING COURT UNDER EMPLOYERS' LIABILITY ACT DEFINED.

Under section 3642, Rev. St. 1913 (part 1, Employers' Liability Act), the court has power to reverse a judgmentt in a proper case if the evidence shows inadequacy in the amount of the verdict; or to reverse a judgment that from the evidence appears to be excessive, and grant a new trial, unless a remittitur be filed in such sum as to the court may seem just.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

Appeal from District Court, York County; Good, Judge.

Action by John V. Brown against the York Water Company. Judgment for plaintiff, and defendant appeals. Affirmed on condition.

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W. W. Wyckoff, of York, and C. C. Flansburg, of Lincoln, for appellant.

W. T. Thompson, of Lincoln, for appellee.

DEAN, J. Plaintiff sued under part 1 of the Employers' Liability Act to recover damages for personal injuries sustained as defendant's employe, while in charge of a water pumping plant that it owned and operated at York. He recovered judgment for $10,000, and defendant appealed.

Plaintiff is an electrician and mechanical engineer. Power to operate the pumps was supplied by an electric light plant located some blocks distant. The accident happened before 8 o'clock in the forenoon, while plaintiff was alone at the pump house, and it caused the loss of his right hand, the thumb only remaining. He was then 36, with an expectancy of 31 years, and had been actively working at his trade about 12 years. The injury was sustained a little more than two months after his employment began.

Defendant concedes that its liability was not insured as provided by section 3687, Rev. St. 1913, as amended by section 21, c. 85, Laws 1917, part 2, Employers' Liability Act. But it argues at some length that plaintiff waived the requirement of section 21, as it affects defendant, and that he brought himself within the provisions of part 2 by accepting benefits from the water company within the time and in the manner provided in section 3661, Rev. St. 1913, as amended by section 6, c. 85, Laws 1917.

On this point the superintendent of the defendant company testified that he showed plaintiff the hospital bill, and asked him if the company should pay it, and that, "he said, 'Yes,' and I paid it;" that he made the same inquiry about the doctor bill, and upon receiving the same reply he paid that too, and that both bills approximated $150. He further testified:

"I asked Mr. Brown whether he expected more benefits than he had received, and he said, 'Yes,' and that he thought he ought to have enough money to start a little business."

Plaintiff's testimony on this point was to the contrary, and to the effect that the superintendent asked him for the hospital bill, and later the doctor bill, and that he voluntarily and without plaintiff's request paid both bills. Referring to the doctor bill, he said he told the superintendent that "he didn't have to pay the bill if he didn't want to," and that the superintendent replied:

"If we pay this bill, will you release the company?" and I says, "No; I will not; I feel as though I ought to have more out of this than a $100 doctor bill."

On this question of fact the evidence was about evenly balanced and the jury seems to have accepted plaintiff's version rather than defendant's.

Defendant argues that plaintiff was willfully negligent, and complains because its motion for a directed verdict was not sustained. It is insisted that he comes within the exception noted in section 3643, Rev. St. 1913, which provides generally that:

"In all cases brought under part 1 of this article it shall not be a defense (a) that the employe was negligent, unless and except it shall also appear that such negligence was willful."

In section 3693, Rev. St. 1913, as amended in section 23, c. 85, Laws 1917, willful negligence is defined:

"(d) For the purpose of this article, willful negligence shall consist of (1) deliberate act, or (2) such conduct as evidences reckless indifference to safety."

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Respecting plaintiff's employment and as bearing on the question of willful negligence, he testified on direct examination that he was employed to "take charge of the plant—operate and take care of the outside work and meters—and reading meters"; that "it is not customary for any engineer or men working around mechanical machinery to stop it" to do the work he was doing when injured; that the main drive shaft has two pinions that mesh on two large gear wheels that make about 200 revolutions a minute; that he was cleaning off the grease "close to the pinion, and it caught the waste and jerked my hand in"; that it is dangerous to wear gloves when cleaning the gearing, and for that reason he took his gloves off; that the pumping machinery was controlled by two switches, one at the electric light plant and one in the pump house, the latter being about 16 feet from where he stood when he was injured. He said that he did not turn off the current before he began the work that resulted in the injury; that the pump was driven by a 35 horse power motor; that after the accident he saw some covering for the pinions in the back room of the pump house, but never saw it before, nor knew it was there, nor did he ever ask for any shield or covering for the pinions.

Defendant argues that plaintiff's conduct at the time of the accident, as shown by his evidence, comes within the meaning of "willful negligence" as defined by the act, and that it so plainly "evidences reckless indifference to safety" that the court erred in overruling its motion for a directed verdict. We do not think, in view of all the circumstances, that the court erred in overruling the motion. It seems though the Legislature has conferred upon the courts power to pass on the question as to whether a verdict sufficiently responds in damages or whether it is excessive, this power, of course, to be exercised upon a review of the facts as shown by the evidence in each case.

Section 3642, Rev. St. 1913, being the first section of part 1 of the Employers' Liability Act, provides:

"When personal injury is caused to an employe by accident arising out of and in the course of his employment, of which the actual or lawful imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employe was himself not willfully negligent at the time of receiving such injury, and the question of whether the employe was willfully negligent shall be one of fact to be submitted to the jury, subject to the usual powers of the court over verdicts rendered contrary to the evidence, or to law."

A number of other assignments of error have been made which we have examined, but none of the alleged errors complained of seem to have been prejudicial to the rights of the defendant.

We think that in view of the evidence the verdict is excessive. We therefore conclude that, under the express provisions of the act relative to the powers of the court over verdicts, if plaintiff files a remittitur of $2,500 with the clerk of this court within 20 days, the judgment will be affirmed for $7,500, with interest at 7 per cent. per annum from the date of the judgment and for cost. Failing in this, a new trial will be granted.

Affirmed on condition.

Flansburg, J., not sitting.

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HUGH MURPHY CONST. CO. v. SERCK. (No. 21380.)

(Supreme Court of Nebraska. April 17, 1920.)

177 Northwestern Reporter 747.

(Syllabus by the Court.)

1. MASTER AND SERVANT—EMPLOYEE INJURED BY NEGLIGENCE OF THIRD PERSON IN COURSE OF EMPLOYMENT ENTITLED TO COMPENSATION.

An injured employee under article 8, pt. 2, of the Workmen's Compensation Act, is entitled to compensation from his employer for an accident arising out of and in the course of his employment, even though the injury occurs by the negligence of a third party. In such a case, under section 3659, Rev. St. 1913, the employer is subrogated to the rights of the employee against such third person. If the employee settles with the wrongdoer, the employer is entitled to have the amount received applied pro tanto in payment of the compensation awarded by the Compensation Commissioner.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

2. MASTER AND SERVANT — NEGLIGENT THIRD PERSON'S SETTLEMENT WITH INJURED EMPLOYEE DOES NOT PRECLUDE EMPLOYER'S RECOVEY OVER.

A negligent third party cannot, without the consent or concurrence of the employer, by settlement with an injured employee, affect or preclude the right of recovery by the employer for damages sustained by the injured workman to the extent of the compensation awarded.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Appeal from District Court, Douglas County; Sears, Judge.

Proceeding by the Hugh Murphy Construction Company, employer, in the nature of an appeal from the decision of the district court and Compensation Commissioner, awarding compensation under the Workmen's Compesation Act to Henry Serck, employee. Modified and affirmed.

W. H. Herdman, of Omaha, for appellant.

J. C. Kinsler and A. W. Elsasser, both of Omaha, for appellee.

LETTON, J. This is a proceeding in the nature of an appeal from the decision of the district court and Compensation Commission from an award made against the appellant in a proceeding under the Workmen's Compensation Act (Rev. St. 1913, §§ 3642-3696). There is no bill of exceptions, and the only question is whether the proper judgment was rendered under the findings of fact. The court found:

"That for some time prior to the 11th day of September, 1918, the said Henry Serck was in the employ of said Hugh Murphy Construction Company, and was earning more than $18 a week; that both plaintiff and defendant were operating and working under and governed by the provisions of the Workmen's Compensation Law of the state of Nebraska; that on said 11th day of September, 1918, while the said Henry Serck was driving a truck for the said Hugh Murphy Construction Company along and upon one of the business streets of the city of Omaha, Neb., the Omaha & Council Bluffs Street Railway Company negligently drove one of its cars against said truck, and negligently caused the said Henry Serck to be thrown from said truck and severely injured; the said injury consisted in seriously bruising or breaking his left leg at or near

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the ankle, and that said injury was one arising out of and in the course of the employment of said Henry Serck by the said Hugh Murphy Company, and resulted in the said Henry Serck being wholly disabled for a period of 20 weeks; that the said Henry Serck is entitled to recover compensation from his employer, the said Hugh Murphy Construction Company, for a period of 20 weeks at the rate of $12 per week.

"The court further finds that, by executing to said Omaha & Council Bluffs Street Railway Company the release pleaded by the above-named plaintiff and appellant, Hugh Murphy Construction Company, the defendant and appellee, Henry Serck did not in any manner give up, release, or relinquish his right to compensation, but that he only gave up, released, or relinquished such right as he or his employer for him might have had to recover something by way of damages from said street railway company over and above any amount for which the employer, the above-named plaintiff and appellant, Hugh Murphy Construction Company, should be liable for or pay to its employe, the above-named defendant and appellee, Henry Serck, as compensation for his said injuries in accordance with the terms and provisions of said Workmen's Compensation Law."

It was adjudged that Serck recover compensation at the rate of $12 per week for 20 weeks, or $240.

[1, 2] Section 3651, Rev. St. 1913, provides with respect to parties who have accepted the provisions of part 2 of the act:

"Compensation shall be made for personal injuries to or for the death of such employe by accident arising out of and in the course of his employment, without regard to the negligence of the employer."

For every such injury it is mandatory that compensation be made, but, where a third person has caused the injury, section 3659 provides:

"The employer shall be subrogated to the right of the employe or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employe or dependents, but such employer may recover any amount which such employe or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employe or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation."

When the accident happened the employer became liable to the employe for compensation to be paid according to the provisions of the statute. The employer also was subrogated to the right to recover from the negligent third party the full amount of damages suffered by the injured workman. The amount which the employe was entitled to receive from the employer was in a large degree fixed by statute, but the amount which the employer might in turn recover from the wrongdoer is to be determined either by settlement satisfactory to the three parties concerned, or by the ordinary process of litigation in an action for damages. The wrongdoer must take notice of the rights of all, and cannot by a settlement with the injured party increase the burden of the innocent employer. The parties concerned are equal in the eye of the law, and the courts will not suffer one to profit at the expense of either of the others. To allow the workman to settle with the street railway company for an unfair or an inadequate sum would compel the employer to be mulcted to an additional extent; therefore, when the street railway company settled with the injured workman, it took the risk of having to pay additional damages to the employer if the settlement was not fair, adequate, and satisfactory. If such settlement was satisfactory to it, the employer is entitled to deduct from the amount of compensation the money which the injured workman has already received by way of set

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tlement. If, however, the settlement was inadequate or obtained by fraud or mistake, and the employer is compelled to pay a greater sum by way of compensation, the employer still has his remedy by proceeding against the street railway company for any damages suffered by the workman in excess of the amount paid by way of settlement. There is no provision in the Nebraska statute, as in those of some states, requiring the injured employe to elect between claiming compensation under the statute and an action for damages against the negligent third party. The following cases support our conclusions: Woodward v. Conklin & Son, 171 App. Div. 736, 157 N. Y. Supp. 948; McGarvey v. Independent Oil & Grease Co., 156 Wis. 580, 146 N. W. 895; Lester v. Otis Elevator Co., 90 Misc. Rep. 649, 153 N. Y. Supp. 1058.

The judgment of the district court is therefore modified to the extent that the $75 received from the street railway company shall be considered to have been applied in payment of the first installments of compensation until exhausted, and that the remaining installments shall be paid at the rate of $12 per week until the full sum of $240 has been paid.

Modified and affirmed.

Rose, J., not sitting.

SIMPSON v. ATLANTIC COAST SHIPPING CO., Inc.

(New York Supreme Court, Appellate Division, First Department. May 14, 1920.)

182 New York Supplement 331.

5. MASTER AND SERVANT — DEFENSE OF REMEDY UNDER COMPENSATION LAW HELD NOT AVAILABLE TO EMPLOYER DOING BUSINESS IN FOREIGN STATE.

Employer of a longshorman being a foreign corporation, and having been doing business in a foreign state, where accident to the longshorman happened, in absence of anything to show the longshoreman has any remedy under any Workmen's Compensation Law of any state, no such defense is available to the employer, when sued for injuries.

(For other cases, see Master and Servant. Dec. Dig. § 369.)

Clarke, P. J., and Page, J., dissenting.

Appeal from trial term, New York County.

Action by George Simpson against the Atlantic Coast Shipping Company, Incorporated. From a judgment on a verdict for plaintiff, and from an order denying its motion for new trial (176 N. Y. Supp. 731), defendant appeals. Judgment and order affirmed.

Argued before Clarke, P. J., and Laughlin, Smith, Page, and Merrell, JJ.

Amos H. Stephens, of New York City (E. C. Sherwood, of New York City, for counsel), for appellant.

David M. Fink, of New York City (Moses Feltenstein, of New York City, of counsel, and Jacqin Frank, of New York City, on the brief), for respondent.

SMITH, J. The plaintiff is a longshoreman. The defendant was loading and unloading vessels at Norfolk, Va., and employed the plaintiff

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upon this work. In the course of the business a derrick was used, which was furnished by the shipowner. When the defendant's men were getting ready to load the ship, it was found that the boom upon the derrick was required to be moved. The boom upon the derrick was a heavy one. This boom is held in place by what is called a topping lift, which, in this case, consisted of a wire cable fastened to the end of the boom, and going from there to a pulley at the top of the mast, and from thence down along the side of the mast to the deck of the ship. This was fastened at the bottom of the mast by being wound around some cleats and then wound around the mast itself. The exact nature of the fastening at the bottom of the mast is not material to the question raised here. In order to lower the boom it was necessary to loosen the hold at the bottom of the mast, so as to give more length to the topping lift. In order that the weight of the boom should not be so great that the workmen who were raising and lowering the boom would lose control, it was customary to fasten the topping lift to the deck of the ship by means of a backing strap, or stopper, as it was called. This, it seems, was in general used for this purpose, and apparently was necessary for the safe handling of the derrick. This backing strap was supposed to be a part of the equipment of the derrick itself, which is ordinarily furnished by the shipowner who owned the derrick. The defendant did not furnish the derrick, and was not expected in the first instance to furnish the backing strap. When it became necessary to lower this boom, the hatch boss who was immediately over the plaintiff started to look for a backing strap. He went around the ship and was unable to find one. He swears that he came back to the derrick and found that the next man in charge had started to lower the boom without the safety appliance of the backing strap, and that he joined in and helped, and that the plaintiff was one of the helpers. The boom, however, was too heavy for them to handle, and got away from them, and the topping lift, which was a steel cable, flew up and injured the plaintiff.

The claim of the plaintiff is that this defendant, as his employer, was bound to furnish him both a safe place to work and safe appliances with which his work could be done, and for the injury occasioned by the failure so to supply the plaintiff with safe appliances this judgment was properly rendered.

The contention of the defendant is: First, that the defendant was not bound to furnish a backing strap, but that that was an appliance which should have been attached to the derrick and which the boat-owner was to furnish; second, that the workmen had at hand other straps which could be used therefor, and the failure of the hatch boss to use those other straps was the negligence of a coemploye; third, that the plaintiff's only remedy was under the Compensation Law of this state; and, fourth, that the plaintiff's recovery was to be governed by the rules of maritime law, in which the measure of damage is claimed to have been different from that adopted by the court.

[1, 2] As to the first contention, I think the shipowner was primarily bound to furnish this backing strap, and the defendant had the right to rely upon the fact that that backing strap would be furnished for its use by the shipowner. This, however, does not relieve the defendant from its liability to the plaintiff to furnish him safe appliances with which he may do the work which he is employed to do. When it was discovered that this backing strap was not there, the defendant could not put the plaintiff to work without appropriate appliances, merely because the shipowner had failed in its duty to furnish this backing strap. The defendant was bound to furnish some safety device which would protect the plaintiff in case the boom was too heavy for the men themselves to handle. The hatch boss did in fact look around for a backing strap. At one of the other hatches upon the boat a block and tackle were used as a safety device, but no backing strap was found and no other safety device was used. The plaintiff swears that the hatch boss himself directed him to

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take hold of this topping lift for the purpose of changing the boom without this safety device. The duty to furnish safe appliances is the duty of the master, and is one that cannot be delegated. Whether the plaintiff was directed by the hatch boss himself, or by the man in charge when the hatch boss was absent, the negligence of the man in authority at the time in directing him to assist in lowering this boom without the safety devise was the negligence of the employer. If it were the employer's duty to furnish safe appliances, it was his negligence in putting the men to work without those safe appliances.

[3, 4] Second. It is true that the defendant had at the dock some gearing which was used to fasten the load upon the basket at the end of the boom, so that it could be taken over from the dock to the boat. Some of this gearing consisted of chains. It is argued upon this appeal that, as these chains were furnished, the negligence of the hatch boss in not procuring them and using them was the negligence of a fellow servant, and not the negligence of the master. The difficulty with this contention is, first, that this contention was not made at the Trial Term, and no such defense was there urged. In the second place, there is no proof that any chains were a part of this gearing which were furnished by the master were capable of use as a backing strap. It might further be added that they were furnished for a particular purpose, that of fastening the load upon the basket, which was swung around from the dock to the boat. They were not furnished for use as a backing strap, but furnished for another purpose. The defendant cannot excuse itself for its negligence by claiming that its foreman should have used them for some other purpose than that for which they were in fact furnished.

[5] Third. It was not contended at the trial that the plaintiff had any remedy under the Compensation Law. This question was first raised after the verdict of the jury. It was not raised in the defendant's pleading. Moreover, the evidence does not show that this contract was made in New York, although the parties went from New York to Norfolk together. The defendant is a foreign corporation, doing business in a foreign state, where the accident happened, and there is nothing to show that the plaintiff has any remedy whatever under any Compensation Law of any state. No such defense, therefore, is available to the defendant in this case.

Fourth. The defendant claims that this accident, happening upon the boat, in navigable waters, although at the dock, is to be governed by the maritime law, and that the measure of damage as held by the United States courts under that law is different from the measure of damage in a common-law action. In Scarff v. Metcalf, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807, the owner of a vessel was held liable for damages sustained by reason of the neglect of the master to furnish and render a seaman medical attendance and care. This action was brought in the state court and the plaintiff was allowed to recover full indemnity for the injury suffered. The injury thus suffered in loading the boat upon navigable waters would seem to present a case for the jurisdiction of the United States courts under the maritime law, as has been held in Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; also in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. In the case of Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 Sup Ct. 501, 62 L. Ed. 1171, the Supreme Court has held that by the general maritime law, the vessel owner is liable only for the maintenance, cure, and wages of a seaman injured in the service of his ship, by the negligence of a member of the crew, and it was there held that the rules of the maritime law governed both the right of action and the measure of damage. The maritime law (section 9 of the Judiciary Act of 1789 [U. S. Comp. St. § 991]) gives original cognizance of all civil causes of admiralty and maritime jurisdiction exclusively to the District Courts of the United States, saving to

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suitors, in all cases, the right of a common-law remedy where the common law is competent to give it. It was further held in that case that this act gave only the right to the common-law remedy and that the right of recovery should be determined upon the principles of the maritime law. In 35 Cyc. 1200, it is stated that under the maritime law a seaman who receives an injury while in the service of the ship is entitled to medical care, nursing, and attendance, and to a cure, so far as cure is possible, at the expense of the ship, and this is true even though the cause of the injury can be attributed to the fault of no one, and the negligence of the seaman himself will not defeat the right. At page 1244 it is also stated:

"The liability of a vessel or her owner to a crew does not ordinarily include any compensation or allowance for the resulting effects of an injury received while in her service, no fault tending to produce the injury being shown in the vessel, her appliances, equipment, or officers, but is limited to the expenses of the care, attendance, and cure of the seamen. The vessel and her owner are, however, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

[6] To this statement numerous cases are cited in the notes, including the case of Scarff v. Metcalf, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807. It would seem, therefore, if this action were brought against the owner of the vessel, and negligence on the part of such owner was shown in failing to supply the proper appliances, that the plaintiff would be entitled to "indemnity" for "resulting effects," and would not be limited to the costs of medical treatment and cure. It follows, where a longshoreman is employed by an independent contractor in the loading of a ship by reason of the failure of that contractor to provide proper appliances, that he would be entitled to recover indemnity for resulting effects of his injury, even under the rule of maritime law, if that be held to govern the rule of damages in this case.

The judgment and order should therefore be affirmed, with costs.

Laughlin and Merrell, JJ., concur.

Clarke, P. J., and Page, J., dissent.

CHRISTIAN v. STATE CONSERVATION COMMISSION et al.

(New York Supreme Court, Appellate Division, Third Department. May 5, 1920.)

182 New York Supplement 347.

MASTER AND SERVANT—DEATH FROM PNEUMONIA FROM WORKING IN WATER HELD "ACCIDENTAL INJURY" WITHIN COMPENSATION ACT.

Death of game protector, employed by conservation commission of the state of New York, while fixing a state boat for winter quarters, with his arm and shoulder in the water to remove a plug, so that he contracted lobar pneumonia, which, together with heart toxemia caused his death, *held* an "accidental injury," within the Workmen's Compensation Act; "accident meaning an undesigned and unforseen occurrence of an afflictive

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or unfortunate character, and "injure" meaning to harm, or to inflict damage or detriment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Accident; Injury.)

Henry T. Kellogg and Woodward, JJ., dissenting.

In the matter of the claim of Elizabeth Christian, dependent wife of James B. Christian, deceased, for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67), against the State Conservation Commission, the employer, and the State Insurance Fund, insurance carrier. On certified question as to whether the death of the employee was due to accidental injuries arising out of and in course of his employment as a game protector of the State Conservation Commission. Question answered in the affirmative.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Charles D. Newton, Atty Gen. (E. C. Aiken, Asst. Atty. Gen., of counsel), for State Industrial Commission.

William M. Nicoll, Jr., of Schenectady, for employer and insurance carrier.

John M. Kellogg, P. J. The question is certified upon the following findings of fact: While said James B. Christian was engaged in the regular course of his employment, while fixing state boat George D. Pratt for winter quarters, and while trying to remove a plug from the bottom of the said boat, in order to let water out of the boat, the said James B. Christian was compelled to work with his arm and shoulder in the water in removing the said plug, as a result of which he contracted lobar pneumonia, which, together with heart toxemia, caused his death on December 10, 1918.

"The word 'accident' is susceptible of and has received many definitions, varying with the connection in which it is used. * * * As used in an indemnity policy, such as this, we are of the opinion that the word 'accident' means an undesigned and unforeseen occurrence of an afflictive or unfortunate character, resulting in bodily injury to a person other than the insured." Melcher v. Ocean Accident & Guarantee Corp., 226 N. Y. 51, 56, 123 N. E. 81, 82; Lewis v. Ocean Acc. & G. Corp., 224 N. Y. 18, 20, 21, 120 N. E. 56; Matter of Rist v. Larkin & Sangster, 171 App. Div. 71, 156 N. Y. Supp. 875.

To "injure" means to harm, to inflict damage or detriment upon; to impair or deteriorate in any way; to subject to any deleterious or noxious action or influence, hurt, harm; a word of very wide application, as to injure property by misuse or neglect or injure the health by overwork or dissipation. To injure another's reputation by slander; to injure the cause of morality by bad example. Standard Dictionary.

The meaning of the words "accidental injury," used in a statute which is to be liberally construed towards an unfortunate employe, would seem to follow from these authorities and bring this case within the act. That the employe met his death from the work he was doing in the course of his employment is beyond question.

Compensation has been awarded in the following cases as accidental injuries:

Anthrax: Brintone, Limited, v. Turney [1905], A. C. 230, 7 W. C. C. 1 (Bradbury's Workmen's Compensation Law [3d Ed.] 394). This

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case was cited in Lewis v. Ocean Acc. & G. Corp., 224 N. Y. 18, 21, 120 N. E. 56. See, also, Hiers v. Hull & Co., 178 App. Div. 350, 164 N. Y. Supp. 767.

Glanders: Hood & Sons v. Maryland Casualty Co., 206 Mass. 223, 92 N. E. 329, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379.

Sunstrokes and heat strokes: Hernon v. Holchan, 182 App. Div. 126, 169 N. Y. Supp. 705; Campbell v. Clausen-Flanagan Brewery, 183 App. Div. 499, 171 N. Y. Supp. 522; Ismay, Imrie & Co. v. Williamson, 99 L. T. 595, 1 B. W. C. C. 232. See Bradbury's Workmen's Compensation Law (3d Ed.) p. 444.

Frost bite: Phonville v. N. Y. & Cuba Steamship Co., 187 App. Div. 912, 173 N. Y. Supp. 919; Id., 226 N. Y. 622, 123 N. E. 258.

Inhalation of poisoning fumes: O'Dell v. Adirondack El. Power Co., 181 App. Div. 910, 167 N. Y. Supp. 1116; Id., 223 N. Y. 686, 119 N. E. 1063.

Standing in an unnatural position with consequent lameness: Karlin v. Kamber & Co., 18 S. D. R. 561; Id., 188 App. Div. 941, 175 N. Y. Supp. 907.

I conclude that the death resulted from an accidental injury, and favor an affirmative answer.

Question certified answered in the affirmative.

Cochrane and Kiley, JJ., concur.

Henry T. Kellogg, J. (dissenting). The State Industrial Commission has certified to this court the question whether or not the death of one James B. Christian was due to accidental injury arising out of and in the course of his employment. Christian was engaged on December 3, 1918, in making ready for winter quarters a motorboat of his employer, which was in a boathouse located at the edge of the Hudson river in Albany. The boat had been lifted from the water and was resting upon jacks about one foot above it. In order to drain the boat, it became necessary to remove a plug from its underside. Christian lay down upon a platform at the edge of the water, and, with a bolt and hammer in his hands, reached out his arms underneath the boat and for a half hour thereafter was engaged in pounding at the plug. He was upon his right side, and in order to operate his hammer he found it necessary frequently to immerse his right arm and shoulder in the water below the boat. The water was almost at the freezing point. As the result of his work in water, Christian was seized with a cold, from which lobar pneumonia developed, causing his death on the 10th of December following. The question certified, therefore, propounds the doubtful problem whether or not a cold, naturally resulting in pneumonia and death, contracted by partial immersion in cold water, voluntarily undertaken and endured, is an accidental injury within the meaning of the Workmen's Compensation Law.

It is for a disability or death resulting from injury, not from accident, that compensation by the express terms of the statute is made payable. Section 10, Workmen's Compensation Law. In common speech "injury" signifies bodily hurt suddenly inflicted. It never denotes an internal ailment which gradually developed. In other words, it is an *in*fliction, not an *af*fliction. If one should say that he suffered from an injury, no one would entertain the thought that he might be afflicted with a malady, even with a malady to which accidental exposure might have given rise. Therefore, were the case one of first impression, my view would be that Christian, though he contracted a cold through exposure, nevertheless sustained no injury from which his death resulted.

In the light of a decision of this court, however, that view appears now to be untenable. Matter of Rist v. Larkin & Sangster, 171 App. Div. 71, 156 N. Y. Supp. 875. In that case the claimant became tubercular because of a cold contracted by jumping into a river to avoid being struck by a falling timber. It was there said "his being accidentally

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thrown 10 feet into the water was an injury," and a recovery was accordingly upheld. That case, however, leaves open the question whether the injury in this instance was accidental, for the court there pointed out:

"The jumping into the river therefore was not a voluntary act, but was a result of the accident, which put the claimant in such peril that his getting wet must be considered accidental, rather than voluntary."

In this case the deceased voluntarily and by intention immersed his shoulder and arm in cold water, and, though the cold which he contracted may have been an injury, its contraction was not accidental, so that his death did not result from accidental injury, and was not compensable Accordingly the question certified should be answered in the negative.

Woodward, J., concurs.

HUBBS v. ADDISON ELECTRIC LIGHT & POWER CO. et al.

(New York Supreme Court, Appellate Division, Third Department. May 14, 1920.)

182 New York Supplement 152.

MASTER AND SERVANT—AMENDMENT TO COMPENSATION LAW AUTHORIZES AWARD TO OFFICER AND MAJORITY STOCKHOLDER OF EMPLOYER.

Under Laws 1916, c. 622, § 9, amending Workmen's Compensation Law by adding subdivision 6 to section 54, which authorizes insurance carrier to issue policies including employers who perform labor, if their wage value is reasonably and separately stated in and added to the pay roll on which the premium is computed the general manager and majority stockholder of a corporation, paid a reasonable fixed salary as manager by the corporation and performing labor in its plant, can recover compensation from the insurance carrier, if his salary was expressly included in the policy.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Award of State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Melvin G. Hubbs, employee, opposed by the Addison Electric Light & Power Company, employer, and the Utilities Mutual Insurance Company, insurance carrier. From an award of compensation by the State Industrial Commission, the insurance carrier appeals. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane Henry T. Kellogg, and Kiley, JJ.

Edward R. Rayher, of New York City, for appellant.

Charles L. Crane, of Addison, for respondent.

Charles D. Newton, Atty. Gen., and Bernard L. Shientag, of New York City (E. C. Aiken, Asst. Atty. Gen., of counsel), for State Industrial Commission.

KILEY, J. The Addison Electric Light & Power Company is located at Addison, N. Y. It manufactures and sells electricity, used solely for lighting, public and private, in the village of Addison, N. Y. The claimant was the general manager, secretary, and treasurer of that company;

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as general manager he received $100 a month, and additional salaries for performing the duties of his other offices in the company, if the company made profit enough out of the business to pay the same. He owned 1,950 shares out of 2,300 shares of the stock, approximately 85 per cent. Par value of stock was $10 a share. As general manager he did labor in and about the plant—repairing wires, apparatus, and generally was depended upon to keep the plant going and producing the product in which it dealt. On December 1, 1918, he had repaired a gas producer and was standing on a coal hopper about three feet above the gas producer, reaching up to put an electric light bulb in the socket, when he received a shock from the electricity and fell over backwards; he struck on the stem of the safety valve of the producer, which projected about three inches; it pierced the back near the tenth dorsal vertebra, fractured the spinous process of the vertebra, punctured the left lung, and produced complete paralysis. The corporation paid the Utilities Mutual Insurance Company, the carrier and appellant herein, for compensation insurance on the claimant as general manager only.

The appellant urges that, under the ruling in Bowne v. Bowne, 221 N. Y. 28, 116 N. E. 364, Howard v. Howard, 221 N. Y. 605, 117 N. E. 1072, Sharlow v. Sharlow Bros. Co., 181 App. Div. 963, 168 N Y. Supp. 1130, and Kennedy v. Kennedy Mfg. Co., 177 App. Div. 56, 163 N. Y. Supp. 944, reversed on reargument 182 App. Div 907, 168 N. Y. Supp. 1114, the respondent is not entitled to the award. The decisions on all subsequent appeals were based upon Bowne v. Bowne, 221 N. Y. 28, 116 N. E. 364. Chapter 622 of the Laws of 1916 amended the Workmen's Compensation Law (Consol. Laws, c. 67) by adding subdivision 6 to section 54, which reads as follows:

"Any insurance carrier may issue policies, including with employes, employers who perform labor incidental to their occupations, such policies insuring to such employers the same compensations provided for their employes, and at the same rates: Provided, however, that the estimation of their wage values, respectively, shall be reasonable and separately stated in and added to the valuation of their pay rolls upon which their premium is computed. The employer so insured shall have the same rights and remedies given an employe by this chapter."

This amendment to the law took effect in May, 1916; it is in effect permissive, and contemplates future action; it is not retroactive. The claimant in Bowne v. Bowne, 221 N. Y. 28, 116 N. E. 364, met with his accident March 6, 1916. He was not protected by the provision of subdivision 6, section 54. The decision in the Court of Appeals was rendered in May, 1917. Howard v. Howard, 221 N. Y. 605, 117 N. E. 1072, was decided in July, 1917, reversing 176 App. Div. 940, 162 N. Y. Supp. 1124, which was argued in the Appellate Division in January, 1917. We cannot find in the records on appeals in the last-cited cases the dates of the accidents; the amendment is not referred to in either of the opinions or memorandums handed down; it is reasonable to conclude that the accident occurred prior to May, 1916. The accident in Kennedy v. Kennedy Mfg. & Engineering Co., 177 App. Div. 56, 163 N. Y. Supp. 944, must have occurred before May, 1916, as the award appealed from in that case was made May 25, 1916; the award was affirmed. on a reargument (182 App. Div. 907, 168 N. Y. Supp. 1114) the award was reversed, on authority of Bowne v. Bowne and Howard v. Howard, supra.

Sharlow v. Sharlow Bros. Co., 181 App. Div. 963, 168 N. Y. Supp. 1130, was decided by this court in December, 1917; no opinion was handed down, and date of accident does not appear in the report. The brief of appellant says the accident occurred March 29, 1917; that would be nine or ten months after the amendment to section 54 took effect. The decision in this case was based upon and followed Bowne v. Bowne, supra, where the accident occurred before May, 1916, when the amendment took effect.

It should appear, however, that in Sharlow v. Sharlow Bros., supra,

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the salary of the injured employe, who was a stockholder and officer, was included by the employer company in the pay roll, and the premium to be paid was based upon that pay roll, and it was contended by the Attorney General that that fact brought the case within subdivision 6 of section 54; while the insurer claimed and urged that the intent of the employer alone was not controlling, but that the subdivision contemplated an act by the insurer as well as the insured—that the policy should show a joint contemplation of the parties to the contract of insurance, embracing the employer and the officer therein. It was therefore considered that the case did not come within the subdivision, and was controlled by Bowne v. Bowne, supra.

If this amendment means anything, it covers the claimant on this appeal, providing the commission has found the following question or questions of fact in his favor, viz.: That the estimation of his wage value was reasonable, and separately stated in and added to the valuation of the pay roll of the corporation upon which the whole premium was computed. The record sustains the finding of the commission on these questions, and, under section 54, subd. 6, and section 23, of the Workmen's Compensation Law, the award should be affirmed. All concur.

KOLPIEN v. O'DONNELL LUMBER CO. ET AL.

(Supreme Court of New York, Appellate Division, Third Department. May 14, 1920.)

182 New York Supplement, 155.

MASTER AND SERVANT—AMENDMENT TO COMPENSATION LAW AUTHORIZES AWARD TO MANAGER AND MAJORITY STOCKHOLDER.

Under the amendment by Laws 1916, c. 622, § 9, to Workmen's Compensation Law, § 54, which added to that section subdivision 6, authorizing insurance carrier to issue policy covering employers who perform labor, a general manager and majority stockholder of a corporation, receiving a fixed salary and performing labor, can recover compensation, where the policy issued to the employer covered the claimant, and the premium paid therefor specifically covered his proportion of the insurance.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Award of State Industrial Commission.

Proceeding by Frank L. Kolpien under the Workmen's Compensation Law, opposed by the O'Donnell Lumber Company, employer, and the Lumber Mutual Casualty Insurance Company, insurance carrier. From an award of compensation by the State Industrial Commission, the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

D. Theodore Kelly, of New York City, for appellants.

Charles D. Newton, Atty. Gen., and Bernard L. Shientag, of New York City (E. C. Aiken, Asst. Atty. Gen., of counsel), for State Industrial Commission.

J. L. Hulbert, of Dunkirk, for respondent.

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KILEY, J. The O'Donnell Lumber Company, a corporation, runs a planing mill at Dunkirk, N. Y. The claimant was president and general manager, receiving a salary of $2,500 a year. He worked in the lumber yard, cut glass, set glass, and operated machinery, including planer, jointer, and circular and band saws. The policy of insurance issued to this employer covered the claimant, and the premium paid therefor specifically covered his proportion of the insurance. The policy was in effect on December 6, 1918, the day when claimant was injured. While operating the planer, a piece of board, wedged in gig saw, flew, and hit his left hand, crippling same.

The employer and insurance carrier contend that he is not entitled to compensation, because he was president as well as general manager, and that he owned a majority of the stock; that Bowne v. Bowne, 221 N. Y. 28, 116 N. E. 364, and Kennedy v. Kennedy Mfg. & Engineering Co., 177 App. Div. 56, 163 N. Y. Supp. 944, reargued in 182 App. Div. 907, 168 N. Y. Supp. 1114, settles the law against the claimant. We have written in Hubbs v. Addison Electric Light & Power Co, 182 N. Y. Supp. 152, argued at this term, raising the same question; and we have found that the amendment to section 54 of the Compensation Law (Consol. Laws, c. 67) which went into effect in May, 1916 (Laws 1916, c. 622, § 9), adding to the section subdivision 6, took that case, and, if we are right, takes this case, out of the rule laid down in Bowne v. Bowne, cited by appellants, because the amendment was enacted after the accident in Bowne v. Bowne occurred.

The award should be affirmed. All concur.

SACCOMANNO ET AL. v. GRASSE RIVER R. CORPORATION ET AL.

(Supreme Court of New York, Appellate Division, Third Department. May 14, 1920.)

182 New York Supplement, 23.

MASTER AND SERVANT—AWARD FOR DEATH OF RAILROAD EMPLOYEE NOT DISTURBED, IN VIEW OF PRESUMPTIONS.

Where a railroad section foreman was killed by a car belonging to his employer, while standing on a side track in a lumber yard waiting for his men to arrive, so that he could direct them to work on an extension of the road, and no connection of deceased with interstate commerce was shown, an award of compensation under the Workmen's Compensation Law will not be disturbed, in view of section 21 thereof, relating to presumptions.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Cochrane and Henry T. Kellogg, JJ., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Rose Saccomanno to recover for the death of Frank Saccomanno, opposed by the Grasse River Railroad Corporation, employer, and the Lumber Mutual Casualty Company, insurance carrier. From an award by the State Industrial Commision in favor of claimant the employer and insurance carrier appeal. Award sustained.

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Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

D. Theodore Kelly, of New York Cty, for appellants.

Charles D. Newton, Atty. Gen., and Bernard L. Shientag, of New York City (E. C. Aiken, Asst. Atty. Gen., of counsel), for State Industrial Commission.

KILEY, J. Frank Saccomanno, section foreman, in the employ of the appellant Grasse River Railroad Corporation, was instantly killed on October 22, 1918, at about 6:45 a. m. The conditions and circumstances under which he met his death are briefly as follows:

On the night of October 21, 1918, Saccomanno told his men under him that they would work in the lumber yard. On the morning of the 22d he left his home at 6:30 a. m. for his work. His day commenced at 7 a. m. At 6:45 he arrived at appellant's yard at his place of work, and was standing on a side track waiting for the men to arrive. As they came to where he was, he told them that he did not have any ties and was not going to work in the lumber yard that day, but that they should get their lunch before they left for work, and that they would go back to Silver Lake. A car came along at that junction, without warning, struck the foreman and killed him. It appears that the work planned for the 22d of October, the day of the accident, "was repairing ties under rails, for an extension of about two miles from a point known as Cranbury Lake." The place to which the men were directed to return, because of absence of ties, was the "Silver Lake branch," and that is where they were at work the day before the accident. The dependents of the deceased, claimants here, were awarded compensation. The employer and insurance carrier appeal, and ask that the award be set aside and claim dismissed, upon the ground that the decedent was engaged in interstate commerce at the time he met his death. If decedent was engaged in interstate commerce, his dependents would have a claim under the federal law. If engaged in intrastate commerce, they are right in the tribunal which they have selected for relief.

Some confusion arises here, because the Silver Lake branch, where the deceased was on his way to work, or at least the place for which he was about to start, is not identified as the "extension of about two miles from a point known as Cranbury Lake," which is the terminal of the road. The work to be done, with reference to that extension, "was repairing ties under the rails," not upon a road then existing; so that it can reasonably be inferred that the work intended before the order was countermanded was new construction. It appears that the employer is engaged in interstate and intrastate commerce. The evidence does not show that the deceased had any connection with interstate commerce, except such as can be inferred from his position as section foreman. The work which he started to do on the morning in question, viz., in the lumber yard, would not usually be such work as his men would be called upon to do, unless it was to load and carry away the ties. It does not appear for what the Silver Lake branch was used; neither does the record show its connection with the main line. It would seem that under section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67) as to presumptions, we cannot disturb this award. In the matter of the claim of Giuseppe Malandrino v. Southern New York Power & Railway Corporation, 190 App. Div. 780, 180 N. Y. Supp. 735, decided at March, 1920, term, a similar question was before this court; the award was sustained. Shanks v. D., L. & W. R. Co., 214 N. Y. 413, 108 N. E. 644, Ann. Cas. 1916E, 467, Fish v. Rutland Railroad Co., 189 App. Div. 352, 178 N. Y. Supp. 439, and Matter of Plass v. C. N. E. Ry. Co., 226 N. Y. 449, 123 N. E. 852, are against the appellant.

The award should be sustained. All concur except Cochrane and Henry T. Kellogg, JJ., who dissent.

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CHOCTAW PORTLAND CEMENT CO. ET AL. v. LAMB ET AL.
(No. 10494.)

(Supreme Court of Oklahoma. March 23, 1920.)
189 Pacific Reporter, 750.

(Syllabus by the Court.)

1. MASTER AND SERVANT — UNDER WORKMEN'S COMPENSATION LAW THE INDUSTRIAL COMMISSION MAY MODIFY ITS ORDERS.

The power and jurisdiction of the State Industrial Commission under the Workmen's Compensation Law (chapter 246, Sess. Laws 1915) over each case submitted to it is continuing, and the commission may, from time to time, make such modification or change of its former findings or orders relating thereto as, in its opinon, may be just, and under section 12, art. 2, of said Act, the commission may at any time, upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, review any award, and, on such review, may make an award ending, diminishing, or increasing the compensation previous y awarded, subject to the maximum or minimum provided in the act.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—DECISION OF STATE INDUSTRIAL COMMISSION ON QUESTIONS OF FACT IS FINAL.

The decision of the commission is final as to all questions of fact, and this court is not authorized to weigh the evidence upon which any finding of fact is based.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — LOSS OF USE OF ENTIRE ARM EQUIVALENT TO LOSS OF ARM.

Where an injury inflicted upon an employee caused the loss of the use of the entire arm, it is equivalent to the loss of the arm, and the claimant is entitled to the compensation provided by the act for the loss of an arm, although the amputation of the arm was between the elbow and wrist.

(For other cases, see Master and Servant, Dec. Dig. § 385[4].)

4. MASTER AND SERVANT—APPLICATION FOR INCREASED AWARD FOR INCREASED INJURY, FILED MORE THAN A YEAR AFTER INJURY, IS NOT BARRED.

Where an employee files an application for compensation on account of an injury to his hand within a year after receiving said injury, as provided by section 17, art. 2, of the Workmen's Compensation Act, but at the time of making such application the extent of the injury was not appreciated, and it did not then appear that claimant would lose the use of his arm as a result thereof, under the continuing power and jurisdiction of the commission, as conferred by section 12, art. 2, and section 14, art. 4, his application for an increase of the award on account of loss of of the use of his arm growing out of the injury on which his first claim was based was not barred, although not filed within a year after receiving the injury.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

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Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by Short Lamb, employee, to recover compensation for injuries, opposed by the Choctaw Portland Cement Company, employer, and the Commercial Underwriters' Exchange. From an order of the State Industrial Commission, on reopening and making a new award to claimant, the employer and the Commercial Underwriters' Exchange appeal. Affirmed.

Andrews & Anderson, of McAlester, for appellants.

RAINEY, J. This is an appeal by the petitioners, Choctaw Portland Cement Company and Commercial Underwriters' Exchange, from an order of the State Industrial Commission in reopening and making a new award to one Short Lamb, who was injured while in the employ of the first-named petitioner. It appears from the record that there have been three awards in this case; the first having been made on October 8, 1917, the second on March 8, 1918, and the one appealed from on January 27, 1919.

[1, 2] It is first asserted by petitioners that, under section 12, art. 2, of the Workmen's Compensation Act, it is a condition precedent to the right of the commission to reopen an award that there must have been a change in conditions, and that under the evidence in this case it is conclusively shown that there was not any change in the conditions. The section referred to reads as follows:

"Upon its motion or upon the application of any party in interest, on the ground of a change in conditions, the commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this act, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any money already paid."

The commission found that there had been a change in conditions, and the act provides that the decision of the commission shall be final as to all questions of fact. It is unnecessary for us to express an opinion on the proposition of law advanced by counsel that a finding of a court or jury, which is without support in the evidence, presents a question of law, rather than of fact, for there is some evidence in this record supporting the finding of the commission that there has been a change in condition, and this court is not authorized to weigh the evidence upon which that finding is based. Moreover, the jurisdiction of the commission to modify or change its previous findings or orders is not determined solely by the above-quoted provision, for there is another provision, namely, section 14, art. 4, which provides that the power and jurisdiction of the commission over each case shall be continuing, and that the commission may, from time to time, make such modifications and changes of its former findings or orders relating thereto as, in its opinion, may be just, including the right to make physical examination as provided by section 9, art. 2, of the act. It is obvious, from the language of this section that it was the intention of the Legislature that the power and jurisdiction conferred on the commission by the act shall be broad and comprehensive. We will not construe the act to subvert the manifest purpose of the Legislature, as it seems to us that this broad and comprehensive jurisdiction was wisely conferred, since under the act, the injured employe must file his claim for compensation with the commission within one year after he is injured, or his claim for compensation, under the act, is forever barred. Section 17, art. 2, c. 246, Sess. Laws 1915.

It is a well-known fact that the nature and probable effect of an injury, in many cases, cannot immediately be determined by the most proficient physicians or surgeons, and we are confident that the Legislature had

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this fact in mind when it provided in section 14, art. 4, for subsequent physical examinations, and conferred jurisdiction on the commission to modify or change its former findings or orders. The provision thus serves as a protection both to the employer and employe, and enables the commission to change its findings and orders to effectuate justice, where the amount previously awarded was either too large or too small, or where the commission had previously erred in fixing the compensation through mistake, or because of fraud practiced upon it. The facts of this case prove the wisdom of the provision. When the first order was made, the extent of claimant's injury was not determined by the commission; when the second order was made, the claimant's hand had been amputated, and it appeared to the commission that the extent of his injury was the loss of his hand; but when the last order was made, it appeared to the commission, from the evidence, that the claimant was more seriously injured, and that he had lost the use of his arm.

[3, 4] This brings us to a consideration of counsel's second proposition, which is, in effect, that the commission erred in holding that the amputation of claimant's arm between the wrist and elbow was equivalent to the loss of the arm. If we clearly understand counsel's contention in this respect, it is that, inasmuch as the evidence shows that the claimant's arm was amputated between the elbow and the wrist, his right to compensation is governed by that clause of section 6, art. 2, c. 246, Sess. Laws 1915, which reads as follows:

"Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. * * * Amputation at or above the elbow shall be considered as the loss of an arm. * * * The compensation for the foregoing specific injuries shall be in lieu of all other compensation, except the benefits provided in section 4 of article 2 of this act. * * *"

Under this same section of the act the claimant is entitled to 50 per centum of his average weekly wages for 250 weeks for the loss of an arm. Immediately preceding the above-quoted provision is the following:

"Loss of Use. Permanent loss of use of a thumb, finger, toe, hand, arm, foot, leg or eye, shall be considered as the equivalent of the loss of such thumb, finger, toe, hand, arm, foot, leg or eye."

These provisions of the act must be construed together, if possible, so that they will both stand. We can readily do this, because we do not perceive any conflict therein. An amputation between the elbow and the wrist, where it does not also cause the loss of the use of the remaining part of the arm, only entitled the claimant to compensation for the loss of a hand; but where the injury inflicted causes the loss of the use of the entire arm, under the law it is equivalent to the loss of the arm, and the claimant is entitled to compensation provided therefor. A similar question was recently decided by this court in Bristow Cotton Oil Co. et al. v. State Industrial Commission et al. (No. 9120, decided March 16, 1920) 188 Pac. 658, but not yet officially reported. The cases of Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N. Y. Supp. 423, 9 N. & O. C. 342, H. K. Toy & Novelty Co. v. Richards (Ind.) 117 N. E. 260, Northwestern Fuel Co. v. Leipus, 161 Wis. 450, 152 N. W. 856, Ann. Cas. 1918A, 533, and Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 379, are not in point here, for the reason that they involve a consideration of Workmen's Compensation Acts which do not contain provisions similar to those provisions of our Acts that are determinative of the question raised.

The remaining specification of error argued by counsel for petitioners is that claimant's claim is barred under section 17, art. 2, because he did not file an application for the loss of the use of his arm within one year after he was injured. We do not concur in this view. The respondent did file his claim for compensation within a year, but at the time it was filed it did not appear that he would lose the use of his arm. Having

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filed a claim within the time provided by the act we are of the opinion that under the continuing power and jurisdiction of the commission, as conferred by section 14, art. 4, supra, and section 12, art. 2, supra, his claim for the loss of his arm, growing out of the injury on which his first claim was based, was not barred.

Finding no reversible error in the record, the judgment is affirmed.

Owen, C. J., and Kane, Pitchford, Johnson, Higgins, and Bailey, JJ., concur.

MORRIS v. YOUGH COAL & SUPPLY CO.

(Supreme Court of Pennsylvania. Jan. 5, 1920.)

109 Atlantic Reporter, 914.

1. MASTER AND SERVANT—APPEAL FROM AWARD OF COMPENSATION IS IN NATURE OF CERTIORARI.

Proceedings under Compensation Act of June 21, 1915 (P. L. 736), are purely statutory, and the appeal to the court of common pleas is in nature of certiorari.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

2. MASTER AND SERVANT — SUPREME COURT WILL EXAMINE FINDINGS OF REFEREE AND COMPENSATION BOARD.

On appeal from a judgment of common pleas sustaining award of compensation board, the Supreme Court will examine the findings and reasons stated in the adjudication of the referee and the board as well as those on which the opinion of common pleas is based.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

3. MASTER AND SERVANT—FINDING OF DEPENDENCY SUPPORTED BY EVIDENCE WILL NOT BE SET ASIDE.

The finding by the Workmen's Compensation Board of dependency on the deceased employee, if based on any evidence or on an inference fairly deducible therefrom, will be sustained, though the Supreme Court might differ from the conclusion.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

4. MASTER AND SERVANT—"DEPENDENCY" IN COMPENSATION ACT MEANS ACTUAL DEPENDENCY WHICH MUST AFFIRMATIVELY APPEAR.

The term "dependency," as used in the Workmen's Compensation Act, contemplates actual dependency, which must affirmatively appear in the record as a fact.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependency.)

5. MASTER AND SERVANT—"DEPENDENCY" IN COMPENSATION ACT DOES NOT MEAN SOLE SUPPORT.

Actual dependency, within the Workmen's Compensation Act, includes partial support as well as sole and exclusive support, where the partial support was necessary to provide the claimant with some of the ordinary necessities of life suitable for persons in her class and position.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

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6 MASTER AND SERVANT—DEPENDENCY OF WIFE WITHIN COMPENSATION ACT NOT CONTROLLED WHOLLY BY MARRIAGE OBLIGATION.

Dependency of a wife is not controlled wholly by the legal obligation springing from the marriage, but such obligation is one of the elements to be considered in determining the fact of dependency, within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

7. MASTER AND SERVANT—WIFE RECEIVING PARTIAL SUPPORT FROM HUSBAND LIVING APART FROM HER HELD "DEPENDENT" WITHIN COMPENSATION ACT.

Where wife was living apart from her husband with his consent, and engaged in a gainful occupation, but they corresponded regularly, and he frequently visited her and contributed from his earnings to her support, she was dependent within the Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

8. MASTER AND SERVANT — WIFE'S DEPENDENCY WITHIN COMPENSATION ACT NOT ESTABLISHED BY RECEIPT OF MONEY FROM HUSBAND FOR SAVING.

Receipt by the wife of money from her husband for the purpose of accumulating a saving is not receipt of contributions for support, and does not establish her dependency within the Compensation Act, but the mere fact that she had a small sum in the bank does not raise a conclusive presumption that the money contributed by him was for the purpose of enabling her to accumulate the saving.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

9. MASTER AND SERVANT — FINDING OF DEPENDENCY WITHIN COMPENSATION ACT IS ONE OF FACT, NOT CONCLUSION OF LAW.

The determination by the referee that a wife, though not living with her husband at the time of his death, was actually dependent upon him for support, was a finding of fact, and should have been so stated instead of stated as a conclusion of law.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Court on Common Pleas, Allegheny County.

Proceeding by E. Morris against Yough Coal & Supply Company, employer, and Globe Indemnity Company before the workmen's compensation board, to recover compensation for the death of petitioner's husband. An award of compensation by the board was sustained by the court of common pleas, and the Globe Indemnity Company appeals. Affirmed.

Argued before Brown, C. J., and Moschzisker, Frazer, Walling, and Kephart, JJ.

Charles Alvin Jones, Sterrett & Acheson, James L. Weldon, John C. Sherriff, Alexander P. Lindsay, and George C. Bradshaw, all of Pittsburgh, for appellant.

A. M. Oliver and Oscar G. Meyer, both of Pittsburgh, for appellee.

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KEPHART, J. [1]The proceedings under the Compensation Act of June 2, 1915 (P. L. 736), are purely statutory, differing from the common law, and the appeal to the common pleas is in the nature of a certiorari.

[2] For the purpose of review, this court will examine the findings and reasons stated in the adjudication of the referee and the board, as also those on which the opinion of the common pleas is based. McCauley v. Imperial Woolen Co. et al., 261 Pa. 312, 322, 104 Atl. 617. In this appeal we have, as a part of the record, not only the findings of the referee, but an analysis of the evidence on which those findings are based. It was submitted as a part of his report. We will consider the record as thus made up as an aid in determining the legal question presented. The attack upon the award of compensation in the court below was based wholly on the proper determination of clause 9 of section 307, which provides, "No compensation shall be payable under this act to a widow, unless she was living with her deceased husband at the time of his death, or was then actually dependent upon him for support," as it applied to the evidence in the case. Did the record lack sufficient legal evidence to sustain the finding that the claimant, the widow, was actually dependent on her husband for support at the time of his death? We are asked by appellant to hold that a married woman loses her right to compensation if she engages in a remunerative occupation, when it appears she is employed with the consent of her husband, with whom she was on very friendly terms, he communicating with her regularly by letter, frequently visiting her, that he contributed sums of money at various times for her support, though the total contributions would not be sufficient to entirely support her, and she had a small saving of three or four hundred dollars in bank, which was in process of accumulation for a number of years.

[3] If the finding of dependency is based on any evidence or on an inference fairly deducible therefrom, the award must be sustained, though we might differ from the conclusion thus reached. We cannot substitute our judgment for that of the referee or the board, as the Compensation Act has delegated to them the exclusive function of determining these facts. An appellate court will not review such conclusion.

[4] The term "dependency" in the statute contemplates actual dependency, and must affirmatively appear in the record as a fact. No rigid rule can be laid down as to the amount or character of evidence necessary to show actual dependency; therefore each case must be controlled by its own circumstances.

[5] But the term "actual dependency" does not mean sole and exclusive support. It includes as well partial support, and the query arises, were the contributions needed to provide the claimant (recognized as such by the statute) with some of the ordinary necessaries of life suitable for persons in her class and position? It does not mean that the claimant should reduce her expenses to such an amount that she could secure subsistence for herself without the contributions from the deceased employe, in this case her husband. See Dazy v. Apponaug Co., 36 R. I. 81, 89 Atl. 160.

[6] Dependency of married people is not controlled wholly by the legal obligation springing from the marriage contract. This obligation, however, is one of the elements to be considered in determining the fact of dependency. A wife, not living with her husband, who is not supported wholly or partly at the time of the accident by him is not a dependent within the meaning of the statute. The separation may amount to a repudiation of the husband's legal obligation to support, acquiesced in by the wife. New Monckton Collieries, Ltd., v. Keeling, 6 Negligence and Compensation Cases, 240, and note.

[7] But when the wife lives separate from her husband with his consent, earning money through her own labor, which partly reduces her living expenses, and the husband during this period maintains the family relation, visiting his wife, paying a certain portion of the necessary expenses for her support, and often contributing other sums for her use, and

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all of these happenings occur frequently for a year and a half immediately before the accident to her husband, a finding that the wife was actually dependent from this partial support will not be disturbed. She is a "dependent" within the meaning of that term as used in the statute. By her voluntary assumption, under such circumstances, she waives no right, nor does she absolve the company from its statutory duty to provide the compensation called for by the act based on the finding of the referee.

[8] The receipt of money for the purpose of accumulating a saving will not be considered as contributions for support, but the mere fact that claimant had a small sum of money in bank does not raise a conclusive presumption the money was contributed by the husband for the purpose of enabling her to accumulate such saving. It may be considered, along with other evidence, on the question of dependency.

[9] The referee erroneously stated as a conclusion of law, "that the claimant, although not living with her husband at the time of his death, was actually dependent upon him for support." This was a finding of fact, and should have been so stated by the referee. We have regarded it in that light.

The assignments of error are overruled, and the decree of the court below is affirmed.

SMITH v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania. April 12, 1920.)

110 Atlantic Reporter 142

MASTER AND SERVANT—RAILROAD RESISTING COMPENSATION CLAIM HAS BURDEN OF PROVING EMPLOYMENT IN INTERSTATE COMMERCE.

A railroad resisting payment of compensation for the death of an employé on the ground that he was employed in interstate commerce has the burden of proving such fact.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Appeal from Court of Common Pleas, Schuylkill County.

Proceedings under Workmen's Compensation Law June 2, 1915 (P. L. 736), by Amy Smith for compensation for death of her husband, opposed by Philadelphia & Reading Railway Company, employer. Award of referee affirmed, and employer appeals. Affirmed.

Argued before Brown, C. J., and Moschizker, Frazer, Walling, and Kephart, JJ.

George Gowan Parry, of Philadelphia for appellant.
Roscoe R. Koch, of Pottsville, for appellee.

PER CURIAM. Payment of the compensation awarded to the appellee for the death of her husband is resisted by the appellant on the ground that at the time of his death he was in its employ in connection with its interstate commerce business. The burden was upon it to show this before the referee. Hench v. Pennsylvania Railroad Co., 246 Pa. 1, 91 Atl. 1056, L. R. A. 1915D, 557, Ann. Cas. 1916D, 230; Murray v. Pittsburgh, C., C. & St. L. Railroad Co., 263 Pa. 398, 107 Atl. 21. Upon the facts as found

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by the referee, he held that the appellant had not met the burden which was upon it. This was reversed by the compensation board, and its action was subsequently reversed by the court below in affirming the award of the referee. The judgment is affirmed on the following from the opinion of the court below directing it to be entered on the award of the referee, for we can say nothing more:

"From the findings of the referee we are unable to determine whether the deceased at the time of his injury was engaged in flagging the crossing for the passage of the train engaged in interstate commerce, or for the passage of the engine engaged exclusively in intrastate commerce."

Judgment affirmed.

TRUSTEES OF STATE HOSPITAL OF MIDDLE COAL FIELD OF PENNSYLVANIA v. LEHIGH VALLEY COAL CO.

(Supreme Court of Pennsylvania. May 26, 1920.)

110 Atlantic Reporter 255

1. MASTER AND SERVANT—EMPLOYER LIABLE TO HOSPITAL FOR SERVICE UNDER COMPENSATION ACT.

In view of Workmen's Compensation Act, § 306 (e), providing employer shall furnish hospital services during first 14 days after disability, a coal company, which knowingly permitted employés to be moved to a hospital without objection, performed its legal duty, and rendered itself liable to hospital; no formal application by injured employés being necessary.

(For other cases, see Master and Servant, Dec. Dig. § 393½.)

2. MASTER AND SERVANT—FREE HOSPITAL FOR MINERS ENTITLED TO RECOVER FOR SERVICES FROM EMPLOYER UNDER COMPENSATION ACT.

Workmen's Compensation Act being a general law applicable throughout the state, section 306 (e), obligating employer to furnish hospital services for first 14 days after disability, renders a coal company liable for services so rendered injured employés with its acquiescence by State Hospital of Middle Coal Field of Pennsylvania incorporated by Sp. Act June 14, 1887 (P. L. 399), though the act requires hospital to furnish free service to miners.

(For other cases, see Master and servant, Dec. Deg. § 393½.)

Appeal from Superior Court.

Suit by the Trustees of the State Hopital of the Middle Coal Field of Pennsylvania against the Lehigh Valley Coal Company. From judgment for plaintiff, defendant appeals. Affirmed.

Argued before Brown, C. J., and Stewart, Frazer, Walling, Simpson, and Kephart, JJ.

F. W. Wheaton, of Wilkes-Barre, for appellant.
William M. Hargest, Deputy Atty. Gen. for appellee.

FRAZER, J. Plaintiff sued to recover for hospital service rendered defendant's employes from time to time, as appeared by the statement of account, the items of which are conceded to be correct, in a case stated for

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the opinion of the court. Liability was denied on the ground that, under its charter, plaintiff is not authorized to charge for the service rendered. The court below entered judgment for plaintiff, which was affirmed on appeal to the Superior Court, and, upon petition by defendant, an appeal was allowed to this court.

Plaintiff was incorporated by special act of June 14, 1887 (P. L. 399), as a state hospital for the purpose, as set forth in section 9, to provide "care and treatment of persons injured in and about mines, workshops and railroads, and all other laboring men" in the middle coal field district of Pennsylvania, with a proviso that patients should not be admitted to the hospital for treatment to the exclusion of the class specifically mentioned. Section 10 authorizes the trustees to "charge any patient other than the class named in section 9 of this act, an amount sufficient to cover the cost of treatment." It is admitted the account sued for includes only treatment of persons within the class stated, for which no charge for service is allowable under the act of 1887, and that the charges are reasonable. While plaintiff would be without right to claim against those receiving the treatment for which compensation is asked, under its charter act, defendant's liability is based on section 306 (e) of the Workmen's Compensation Act of June 2, 1915 (P. L. 743), which provides that during the first 14 days after disability the employer—

"shall furnish reasonable surgical, medical, and hospital services, medicines and supplies, as and when needed, unless the employe refuses to allow them to be furnished by the employer. * * * If the employer shall, upon application made to him, refuse to furnish such services, medicines, and supplies, the employe may procure the same, and shall receive from the employer the reasonable cost thereof. * * * If the employe shall refuse reasonable surgical, medical, and hospital services, medicines and supplies, tendered to him by his employer, he shall forfeit all right to compensation for any injury or any increase in his incapacity shown to have resulted from such refusal."

The case stated stipulates that the employes of defendant treated at the hospital had been injured in the course of their employment, "and by permission of the defendant were removed to the plaintiff hospital for treatment." No formal application to defendant for medical service was made by the injured employes, and hence no refusal on the part of the employer to furnish treatment, but by giving permission to remove the injured person to plaintiff hospital and acquiescing in such removal defendant must be deemed to have acted in performance of its duty to furnish reasonable medical aid and hospital service, especially as we find nothing to indicate an offer by defendant to personally, through its own facilities, furnish such service. The wording of the act is that employers "shall furnish" such service.

[1] In view of this mandatory provision, and defendant knowingly permitting its employes to be moved to the hospital without objection, it must be held to have adopted this method of performing the duty imposed upon it by law: consequently no formal application by the employe for assistance was necessary as a condition precedent to liability. The employer's duty is to "furnish" medical aid, and not merely to reimburse the injured employe after the service has been procured elsewhere. Had this been an action by the employe based on defendant's refusal to furnish aid, the latter might well set up the facts agreed upon as a complete performance of its duty under the act. The employer, in lieu of furnishing the service required by the act, having acquiesced in the removal of the injured employes to plaintiff hospital for care and treatment, adopted this method of performing its statutory duty, and at once there arose an implied obligation on its part to pay plaintiff for such service.

[2] It is further contended that, since the act of 1887 required plaintiff to furnish free service to the class of persons for whose treatment the action was brought, this exemption extended to the employer and

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operated to relieve defendant from liability. At the time the act of 1887 was passed no obligation on the part of the employer existed to furnish aid of any sort to those injured while in his service. The act of 1915 changed the status of the employer by creating a duty not previously existing and also a condition not in contemplation of the Legislature at the time of the passage of the act of 1887 incorporating plaintiff. The Workmen's Compensation Act is a general law applicable throughout the state, and makes no attempt to exempt from liability a class of employers within a particular district and impose upon the state the burdens they would escape. A construction permitting the hospital under the act of 1887 to recover for service thus rendered at the implied request of the employer permits both that act and the Workmen's Compensation Act to stand together, and avoids a construction of the later act raising a question of its constitutionality.

The judgment is affirmed.

DAY et al. v. SIOUX FALLS FRUIT CO. et al. (No. 4678.)

(Supreme Court of South Dakota. May 24, 1920.)

177 Northwestern Reporter 816

1. MASTER AND SERVANT—COMPENSATION AWARD NOT REVERSED FOR NONOBSERVANCE OF RULES OF EVIDENCE.

As Workmen's Compensation Law should receive most liberal construction, findings and awards of arbitrators and industrial commissioner should not be reversed for failure to observe formal rules of evidence applicable to trials before law courts, unless it clearly appears appellant has been prejudiced in some substantial right.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

2. MASTER AND SERVANT—ASSIGNMENT IN COMPENSATION CASE THAT COURT ERRED IN JUDGMENT AFFIRMING DECISION UNAVAILING.

Assignment of error in a workmen's compensation case that court erred in entering judgment affirming decision of industrial commissioner, standing alone, is unavailing for any purpose, as not pointing out wherein or of what alleged error consists.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

3. MASTER AND SERVANT—EVIDENCE HELD TO SHOW DEPENDENCY.

In proceedings under Workmen's Compensation Act by parents to secure compensation for death of son, evidence *held* to show actual dependency on son.

(For other cases, see Master and servant, Dec. Dig. § 405[5].)

4. MASTER AND SERVANT—THAT PERSONS OF LIMITED MEANS ACTUALLY RECEIVED CONTRIBUTIONS SHOWS DEPENDENCY.

Where persons of limited means, otherwise entitled to compensation for death of employé, actually received contributions for support from

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his wages, facts constitute evidence strongly tending to establish dependency.

For other cases, see Master and Servant, Dec. Dig. § 405[5].)

5. MASTER AND SERVANT—FINDINGS ON QUESTION OF DEPENDENCY NOT REVIEWABLE WHERE SUPPORTED BY EVIDENCE.

Sufficiency of evidence before industrial commissioner on question of dependency of claimants under Workmen's Compensation Act on earnings of deceased son is not subject to review by appellate court, where there is any substantial evidence tending to establish findings.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Circuit Court, Minnehaha County; L. L. Fleeger, Judge

Proceedings by Frank Day and Pearl Day under the Workmen's Compensation Law for death of their son, Van P. Day, the employé, opposed by the Sioux Falls Fruit Company, the employer, and the United States Fidelity & Guaranty Company, the insurer. Compensation was awarded, the award confirmed by the industrial commissioner and the circuit court, and the employer and insurer appeal. Judgment of the circuit court, affirming the order of the industrial commissioner, and order denying new trial, affirmed.

Davis, Lyon & Bradford, of Sioux Falls, for appellants.
Parliman & Parliman, of Sioux Falls, for respondents.

McCoy, P. J. This action arises under the Workmen's Compensation Law (chapter 277, Laws of 1917), and was instituted by Frank L. Day and Pearl Day, father and mother of one Van P. Day, a son, who was killed while in the employment of the Sioux Falls Fruit Company, at the city of Sioux Falls, on the 12th day of March, 1919. Claim was filed with the industrial commissioner by said parents claiming that they were dependent for support upon said deceased employe at the time of his death. The said employer and its insurer, the codefendant, resisted said claim. Under the provisions of said law a board of arbitrators was appointed, testimony taken and heard, and findings and award in the sum of $1,650 made and allowed by said board in favor of said claimants. On demand of defendants a review thereof was had before the industrial commissioner, who received and heard further testimony, and approved and affirmed said findings and award. Appeal by said defendants was then taken to the circuit court, wherein judgment was rendered, affirming the order of the industrial commissioner. Motion for new trial was made and overruled, and an appeal taken to this court.

The first 13 assignments of error refer to rulings in relation to the admissibility of evidence. According to strict and formal rules of evidence, applicable on trials before law courts, some of said assignments may be well grounded, as some of the questions were leading in form, while others called more or less for the expression of a conclusion rather than a direct statement of a probative fact. We are of the view that at least a part of the policy and intention of the Legislature in enacting the Workmen's Compensation Law was to evade the delays and much of the technical formal procedure incident to trials before courts, and to establish a more simple, speedy, less formal and summary method of procedure, unhampered by formal legal rule, for the adjustment of such questions between the employer and employe. Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152, 16 N. C. C. A. 879; Industrial Commissioner v. Johnson (Colo.) 172 Pac. 422, 16 N. C. C. A. 350; Parson v. Murphy, 101 Neb. 542, 163 N. W. 847, L. R. A. 1918F, 479, 16 N. C. C. A. 174.

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[1] We are of the view that the Workmen's Compensation Law should receive most liberal construction, and that the findings and awards of arbitrators and the industrial commissioner should not be reversed for failure to observe the formal rules of evidence applicable on trials before law courts, unless it clearly appears that appellant has been prejudiced thereby to such an extent as to deprive him of some substantial right. Considering the said assignments of error in this light, we are of the view that appellants were in no manner prejudiced by reason of any of said rulings. It does not appear that any evidence was rejected that should have been received and considered, which might have been ground for substantial modification or have changed the result.

[2] The next error assigned is that the court erred in entering judgment affirming the decision of the industrial commissioner. This assignment, standing alone, is unavailing for any purpose, as it in no manner points out wherein or of what such alleged error consists.

Appellants allege that the evidence is insufficient to justify the judgment, in that it fails to show that respondents were dependent upon the deceased son for support at the time of the accident, but does show that they were not and never had been dependent on him, and that no contributions had been made by him to respondents for more than 17 months, and that they were entirely capable of and financially able to support themselves without assistance from deceased. It appears from the record that deceased was 22 years of age at the time of his death: that he had had 2 years in high school. that for some 5 or 6 years thereafter he had been employed in grocery stores and boarded at home, and paid to his mother from $6 to $8 per week, or such sums as he could spare after purchasing his clothes, and that such sums were used in paying family expenses and payments on the home; that in September, 1917, he enlisted and went to France, and returned on the 15th day of February, 1919; that during the time he was in the service he made no contributions to the family, but the father had sent him $25; that he claimed he had purchased a Liberty Bond in the name of his mother for $150, but that the same had not been received; after his discharge from the army he lived at home with his parents, and was receiving $85 per month compensation at the time of his death; that during those 25 days he paid a $30 grocery bill of the father and a payment of $17.50 on the home. It also appears that at the date of the accident the father was 44 years of age, in good health, and regularly employed at $110 per month; that he owned no property except an equity in a home, held under a contract of purchase, and partly paid for, and one other lot partly paid for, and an automobile, partly paid for, with no other debts except current expenses; that the family consisted of the father, mother, 17 year old unmarried daughter, and a married daughter and baby; that the husband of the married daughter was still in the service, and that the married daughter and baby were living with respondents temporarily; that the married daughter was receiving an allotment of $40 per month, about $10 per month of which she voluntarily contributed towards maintaining the home.

[3-5] The deceased was unmarried and left no child or children. The respondents must recover, if at all, under the provisions of section 9458, Rev. Code 1919, which in substance provides that in case the deceased employe leaves no widow, child, or children, but leaves parents who were dependent upon him for support at the time of his death, a sum equal to four times the average annual earnings of the deceased employe, not less than $1,650 nor more than $3,000, shall be paid to such parents as compensation for the death of such employe. This statute makes no distinction between degrees of dependency. The question then is, Were these parents dependent for support, in whole or in some substantial part, upon said deceased son at the time of his death? We are of the opinion that the evidence shows actual dependency. Where persons of limited means, such as respondents, and otherwise entitled to compensation, had actually received contributions for support from the wages of the deceased em-

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ploye, such facts would constitute evidence strongly tending to establish dependency. In re Derinza, 229 Mass. 435, 118 N. E. 942, 16 N. C. C. A. 210; In re McMahon, 229 Mass. 48, 118 N. E. 189. In the last-cited case the situation was strikingly similar to that in the case at bar in relation to the question of dependency of parents. The sufficiency of the evidence before the industrial commissioner, on the question of dependency, is not subject to review, by an appellate court, where there is any reasonable or substantial evidence tending to establish the findings of the commissioner. Paul v. Com., 288 Ill. 532, 123 N. E. 541, 18 N. C. C. A. 292, and note; Crosaro v. Com. (Cal. App.) 177 Pac. 489; Bloomington-B Stone Co. v. Phillips (Ind. App.) 116 N. E. 850.

Finding no prejudicial error in the record, the judgment and order appealed from are affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. ROSS. (No. 8348.)

(Court of Civil Appeals of Texas. Dallas. March 27, 1920. Rehearing Denied May 8, 1920.)

221 Southwestern Reporter 639

MASTER AND SERVANT—EVIDENCE HELD TO SUPPORT JURY FINDING THAT HERNIA DID NOT EXIST BEFORE INJURY.

In an action to set aside an award under the Workmen's Compensation Law, evidence *held* sufficient to support a jury finding that the hernia for which compensation was granted did not exist in any degree prior to the injury, though it was undisputed that the employé had another hernia prior to such injury.

(For other cases, see Master and Servant Dec. Dig. § 405[4].)

Appeal from District Court, Dallas County; Marshall Thomas, Special Judge.

Action by the United States Fidelity & Guaranty Company against W. T. Ross to set aside an award of compensation for injuries under the Employers' Liability Act. From a judgment for defendant, plaintiff appeals. Affirmed.

Seay, Seay, Malone & Lipscomb, of Dallas, and Hunt & Teagle, of Houston, for appellant.

Chas. F. Clint and D. B. Eades, both of Dallas, for appellee.

TALBOT, J. The appellee, Ross, was an employe of the Texas Portland Cement Company at Eagle Ford, Tex., in the capacity of a carpenter, and on or about September 21, 1917, while in the discharge of his duties, sustained an injury which he claims resulted in and produced a hernia. On and prior to the date mentioned the Texas Portland Cement Company was a subscriber to the Employers' Liability Act of the state of Texas (Acts 1913, c. 176 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]), and on that date carried a policy of insurance with the appellant of the kind required by said act. Appellee's claim for the injury alleged to have been suffered by him was properly presented to the Industrial Accident Board and compensation awarded him. Appellant, being

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dissatisfied and unwilling to abide by the award, brought this suit to set it aside. The paragraph of appellant's petition which practically forms the issue between the parties is as follows:

"That on or about said last-named date the defendant, W. T. Ross, claims and alleges to have sustained an injury while engaged in the course of his employment by the Texas Portland Cement Company, and while covered by said policy of insurance, which said alleged injury he alleges produced a hernia, and that the said hernia appeared suddenly and immediately following the injury, and that the same was accompanied by pain, and that the hernia did not exist in any degree prior to the infliction of said injury, all of which is denied by the plaintiff, and it specially pleads that the defendant was suffering with hernia prior to the time of said alleged injury, and that said hernia did exist in a degree prior to the receipt of said injury, and that the same was not accompanied by pain immediately, and that said hernia did not suddenly and immediately follow said injury."

The third paragraph of the appellee's answer, after setting forth that the appellant was duly incorporated, wrote liability insurance, and had a permit to do business in the state of Texas, and that the Texas Portland Cement Company, by whom appellee, at the time of his injuries, was employed, was a subscriber to the Employers' Liability Act and carried a policy of insurance with appellant of the kind required by said act, contains the following allegations:

"That on or about September 21, 1917, the defendant was an employe of the said Texas Portland Cement Company at Eagle Ford, Tex., in the capacity of carpenter, and, while in the course of said employment and in the discharge of his duties, said defendant sustained an injury which resulted in and produced hernia; that said hernia appeared suddenly and immediately following said injury, and that said hernia did not exist in any degree prior to the injury aforesaid, and that said injury was accompanied by pain and suffering and which caused dizziness and nausea."

The case was submitted to the jury on certain special issues and upon the findings made judgment was rendered in favor of the appellee, and, appellant's motion for a rehearing being overruled, it appealed.

The jury found that the appellee, in the course of his employment and on or about September 21, 1917, sustained an injury resulting in hernia; that said hernia appeared suddenly and immediately following the injury; that said hernia did not exist in any degree prior to the injury; and that the injury was accompanied by pain.

The single assignment of error is to the effect that the finding of the jury that the hernia complained of did not exist in any degree prior to the injury for which compensation is claimed is contrary to the law and evidence and is unsupported by any evidence in the case. In connection with the assignment a full statement of the testimony is made, and the sole question to be decided is whether or not it is sufficient, in view of article 5246—23, Vernon's Sayles' Stat. Supp. 1918, our "Workmen's Compensation Law," to justify the finding attacked. The appellee testified, in substance, that in the year 1910, while working on a school building, he sustained an injury which resulted in a hernia on his right side; that thereafter, in the year 1913, and as a result of said hernia, he began wearing a truss, and was wearing the same at the time he received the injury of which complaint is made in this suit; that there was a new opening within about one inch of the old opening. He said:

"I was using a drill to make a hole in a piece of hard wood with an ordinary brace. The table was up from the floor, and I was in an awkward position, and couldn't get my back to the column, and so I had to stand there with that brace against my lower bowels and put the pressure of the head of the brace against my stomach and shove. Just about the time I finished boring the hole, it felt like something had torn loose or broke

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or snapped in my bowels. It was painful and made me sick at my stomach. I was about 50 or 75 yards from the carpenter shop, and I took my tools and went to the shop, and laid down on a bench. About that time Mr. Green, my helper, came along, and he and I worked together to relieve my pain. He rubbed my stomach and tried to help me get out of misery, but couldn't do it, and about that time my superintendent, Mr. Leonard, came along, and he sent me down to the barn, got a buggy and started me to the doctor's office."

He further said that the doctor, who was Dr. Sappington, put him on the operating table, but could not do anything for him, and called up Dr. S. Webb and made a date to perform an operation on him at the hospital in Dallas; that the first trouble or hernia never gave him any pain at all, but that the hernia for which he was suing made him very sick at the stomach and the pain caused by it "was like as if I had had a knife stuck in me." that Dr. Sappington told him that if he did not have the operation performed at once, he would most likely die from blood poisoning; that Dr. Sappington called his trouble hernia, but that he had always called it rupture; that the first rupture occurred in 1910 while he was framing a roof for a school building; that he was raising the head rafter, and the wind blew him down, and the rafter fell across his stomach and caused the hernia; that this old hernia was not giving him a particle of trouble when he received the new hernia; except the inconvenience of wearing a truss; that at the time the new injury of hernia occurred the truss had not slipped off; that when the new injury occurred it hurt him so bad that he went to the carpenter's shop.

Dr. Sappington testified, among other things, that in September, 1917, he was connected with the Texas Portland Cement Company as its resident physician and surgeon; that he recalled the accident to the appellee Ross on September 21, 1917. That appellee told him he had been injured and was having some pain; that he examined appellee and found he was in pain; that he also discovered that appellee had suffered a hernia which he could not reduce, and that he advised an operation immediately; that there were two openings, two separate and distinct openings, and that in reality there were two hernias; that the old hernia was giving no trouble, because the gut was loose in there and would slip back and forth; that "a rupture or a hernia is the protrusion of the loop or kink or piece or particle of tissue through the abdominal opening"; that when appellee arrived at his office he found two protrusions; that he found an old hernia and then just a little above, "say about half an inch," he found another hernia, a new one; that he knew one of them was a hernia, but did not know what the other was, "and none of us knew until we opened it and saw it" and then they found that both of them were hernias; that there was a hernia prior to the time appellee got hurt the last time; that the operation was performed for the new nodule; and that the old hernia did not contribute to the new hernia's existence. Dr. Sappington further said that he could not say that appellee was not more susceptible to some trouble down there from the pre-existing hernia because he did have the old hernia, but that it would be very hard to say that he was weaker in that place than a normal person. that a man who has hernia is not as good as a man that has not got one, but that he could say with a reasonble degree of accuracy that the present hernia, "the thing for which we operated," did not exist before the injury, because, if it had, with this tissue down in there long enough, gangrene would have set up, because the blood supply was cut off; that from this he could say that this new hernia had not existed very long when he saw appellee; that about 97 per cent. of hernias "come without violence and 3 per cent. of them come from traumatism."

Dr. Webb testified, among other things, as follows:

"I am engaged in the general practice of medicine as well as surgery. I am not and have not been connected with the United States Fidelity

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& Guaranty Company in any way. I am not and have not been connected with the Trinity Portland Cement Company. I know the defendant, W. T. Ross. I performed an operation on Mr. Ross, together with Dr. Sappington. I did not get a history of the case. He had a knot or a rupture there, and I just took him to the operating room and put him under a general anesthetic and opened him up and found two hernias there, or a rupture of the big sack with a lot of adhesions, and we found a little opening. I found two openings in this hernia with a small amount of omentum. That was all on the inside of the abdominal cavity. The big sack was old, and there was a lot of adhesions around it. The smaller sack was very small, with a little piece of omentum; that is, fat, that comes from the intestines. That was inside of that sack, and that was what caused his pain. There was just one big sack with a little small opening; one big sack with one small opening in it. The sack is a part of the lining of the abdominal cavity that goes down into the opening. I would call what I found two distinct sacks. I don't know whether to call it two separate and distinct hernias or not. It was just one hernia. The bigger sack was very thick and adhered; the smaller sack was not adhered. It is impossible for me to say whether that existed prior to the present injury or not, or at the time, or anything about it. I couldn't say, and I don't believe anybody else could say. There was one hernia with two sacks or two openings. A hernia did in fact exist there prior to the present injury. I make a specialty of surgery. I guess I have performed about 150 or 200 operations on men for hernia. I do not think an injury produces hernia at all. I believe it is a congenital condition. In abnormal conditions and under abnormal circumstances a hernia will be produced there. I have seen one or two cases where a man's side would be torn and he had a big hole torn there which caused a hernia. That was where the hernia was caused by external violence. I think it is possible that a hernia can be produced by an injury in this way: if he has got a hernia there, the injury will make it larger, and it is apt to do so. But, in my opinion, the injury itself does not primarily produce the hernia at the start. It has got to exist before the injury will effect in one way or the other."

On cross-examination this witness said:

"There were two openings there, and a protrusion in each. One of them had many adhesions around it indicating that it was an old hernia. That one was in the big sack. It was in the inguinal canal right here (indicating). As well as I remember, the one he complained of when I saw him, or the new one, was right above it; I should say about a quarter of an inch. A hernia is a protrusion of the intestines, or some part of the intestines, or the membrane around them, through some opening. If you had two openings and two protrusions, you would have but one sack. You can call it two distinct hernias or a hernia. That is what I said just now. He did have two openings there. Sometimes we find two openings coming through the same ring. But in this case there were two separate and distinct sacks. I was not called upon and did not take particular notice or observe the particular conditions or the history of the case, or whether this was a new or an old condition. I just remedied everything that I thought proper. This small opening had the indication of being a new one through which this omentum protruded, and of being the one that was causing him pain. I think that is the reason he came to me on account of the pain he was suffering. In my opinion a hernia can be caused by a direct injury, but no other kind of injury. If a person had a heavy weight falling down on him, or got in some peculiar position and a hernia resulted immediately with pain, I would say that that could be expected, and that would produce a hernia, but also that the man had a congenital weakness there, and the weight or whatever it was caused an indirect pressure to be so great that it pushed it through the openings. A lick would not be the cause of the hernia. If he had been normal,

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it would not have caused hernia. A normal man would not have that hernia, except he got a direct blow, in my opinion. I cannot tell whether he would have it without the lick or not. The fact that he had a hernia or an opening would make the conditions at that point, say an inch and a half or three-quarters of an inch from that place, more susceptible to protrusion or a rupture than if he did not have the old injury. I understand that the defendant, Mr. Ross, has testified that he was boring a hole in a piece of wood or post; that he had the brace or bit against his stomach and pressing down hard enough to force the bit through the wood. If he did not have a hernia prior to that time, the work he was then engaged in would not produce the hernia for which I operated on him. My idea is that if he was not predisposed to hernia that he could not acquire it except by a very violent blow. There could be pressure enough put on that place to produce the nodule that I found there. The fact that the lower protrusion was already there would have a tendency to contribute to or cause the new one."

Notwithstanding the provision of our statute declaring that in all claims for hernia resulting from injury sustained in the course of employment it must be definitely proven to the satisfaction of the Industrial Accident Board that the hernia did not exist in any degree prior to the injury for which compensation is claimed, we are of opinion we would not be warranted in disturbing the verdict of the jury and judgment of the court on the ground that they are not supported by the evidence. The only finding of the jury attacked as being unsupported by the evidence is the one to the effect that the hernia complained of in this action did not exist in any degree prior to the injury charged to have resulted therein, and our conclusion is that the evidence adduced made this an issue of fact for the determination of the jury. The evidence unquestionably shows that the appellee had suffered a hernia in 1910, long prior to the one for which he sues, but if the hernia sustained on September 21, 1917, was not attributable to the pre-existing hernia, and did not exist in any degree prior to the injury producing it, a recovery could be had therefor. While the evidence is doubtless conflicting, it is amply sufficient, we think, to justify the finding that the appellee, in the course of his employment, sustained a hernia on the 21st day of September, 1917, which was entirely separate and distinct from the one suffered in 1910, not at all attributable thereto, and which did not exist in any degree prior to the injury for which compensation is claimed in this suit. The testimony of the appellee is that the "old hernia was not giving him a particle of trouble when he received the new hernia, except the inconvenience of wearing a truss," and Dr. Sappington testified that appellee had suffered two separate and distinct hernias, an old and a new one; that there were two separate and distinct openings and in reality two hernias; "that he found an old hernia and then just a little above, say about half an inch, he found another hernia, a new one"; that the operation was performed for the new nodule; and that the old hernia was well and did not contribute to the new hernia's existence. Dr. Sappington further testified that about 97 per cent. of hernias come without violence, and about 3 per cent. of them are the result of violence or traumatism. Dr. Webb's testimony differs in some material particulars from that of Dr. Sappington, but he testified in once place that in operating upon the appellee he found two hernias. At another place he said:

"I would call what I found two distinct sacks. I don't know whether to call it two separate and distinct hernias or not. It was just one hernia. * * * There was one hernia with two sacks or two openings."

He further said, however, that—

"Hernia did in fact exist prior to the present injury; that a hernia is a protrusion of the intestines or some part of the intestines or the membrane around them through some opening. If you had two openings

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and two protrusions, you would have but one sack. You could call it two distinct hernias or a hernia."

This witness further testified that in his opinion "a hernia can be caused by a direct injury, but no other kind of injury," but further says that, "if a person had a heavy weight falling down on him, or got in some peculiar position and a hernia resulted immediately with pain, I would say that could be expected and that would produce a hernia." Dr. Webb further testified, in effect, however, that if the appellee had not had a hernia prior to the time he claims to have sustained the new hernia, the work he was then engaged in would not have produced the hernia for which he seeks to recover.

In this state of the testimony we do not believe it can fairly be said that the issue of whether the hernia in question did or did not exist in any degree prior to the injury for which appellee claims compensation was one of law, and not of fact. The trial court regarded it as one of fact, and submitted the issue to the jury. The jury's finding upon it is favorable to appellee, and, there being substantial evidence to support such finding, the judgment is affirmed.

SOUTHERN SURETY CO v. HIBBS et al. (No. 6373.)

(Court of Civil Appeals of Texas. San Antonio. March 24, 1920. Rehearing Denied April 28, 1920.)

221 Southwestern Reporter 303

1. MASTER AND SERVANT—FACTS HELD TO JUSTIFY FINDING THAT PARENTS OF MINOR SON TEMPORARILY EMPLOYED WERE "DEPENDENTS" WITHIN COMPENSATION ACT.

Proof that deceased employé, a 19 year old farmer boy who was his parents' chief help on their rented farm where he worked, sought temporary employment to obtain money to buy clothing for himself with intent to return to the farm to assist his parents, who were poor and failing in health and strength, *held* to justify a finding that they were "dependent" upon him within Employers' Liability Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91).

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

For other definitions, see Words and Phrases, First and Second Series, Dependent.)

2. MASTER AND SERVANT— DEPENDENCY WITHIN COMPENSATION ACT QUESTION OF FACT.

The question of dependency within the Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91) is one of fact rather than law, and each case must rest on its own facts.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

3. MASTER AND SERVANT—TEST OF DEPENDENCY WITHIN COMPENSATION ACT STATED.

Under the Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91, the test of dependency is, not whether the family could support life without the services or contribu-

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tions of the deceased, but whether they depended upon them as part of their income or means of living.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

4. MASTER AND SERVANT—FAILURE TO DEFINE DEPENDENTS WITHIN COMPENSATION ACT HELD NOT ERROR.

In a suit to set aside an award under the Employers' Liability Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246-1 to 5246—91) to parents as dependents, for the death of their son, refusal of the trial judge to define the world "dependents" was not erroneous; the statute itself failing to define it.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

5. MASTER AND SERVANT—FINDING OF DAILY WAGE AS BASIS OF COMPENSATION HELD WARRANTED.

Evidence *held* to sustain a finding as to the amount of daily earnings of those of the same class as deceased employé doing the same work during the preceding year within Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91), providing that where an injured employé shall not have worked for a year his average annual wages shall consist of 300 times the average daily wage which an employé of the same class working substantially the whole of such immediately preceding year in similar emloyment shall have earned during the days when so employed.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Appeal from District Court, Travis County; George Calhoun, Judge.

Proceedings W. M. Hibbs and another under the Employers' Liability Act to recover for the death of J. D. Hibbs, an employé of the Midland Bridge Company, opposed by the Southern Surety Company, insurer. An award by the Industrial Accident Board was affirmed on appeal to the district court, and insurer appeals. Affirmed.

Hart & Patterson, of Austin, for appellant.

Charles W. Webb, of Elgin, and Brooks, Hart & Woodward, of Austin, for appellees.

FLY, C. J. On February 21, 1918, J. D. Hibbs, a son of W. M. Hibbs and Carrie Hibbs, was killed while an employe of the Midland Bridge Company, which was a subscriber under the Employers' Liability Act of 1917, chapter 103, p. 269, General Laws of the Thirty-Fifth Legislature (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91). Appellees filed their claim with the Industrial Accident Board of Texas, as dependent parents of their deceased son, and on September 5, 1918, an order was issued by the Industrial Accident Board awarding appellees weekly compensation of $13.80 for a period of 360 weeks. Appellant, being dissatisfied with the award, gave the required notice and filed suit, being the insurer of the Midland Bridge Company in the district court of the Fifty-Third district of Travis county, to set aside the award. The cause was submitted on the following issues:

(1) "Were the defendants, W. M. Hibbs and Carrie Hibbs, as parents of J. D. Hibbs, deceased, taking into consideration their condition and circumstances in life, dependent wholly or in part upon the labor of the deceased, J. D. Hibbs, for support at the time of the accident which resulted in his death?"

(2) "What was the average daily wage which was earned by an employe of the same class as the deceased, J. D. Hibbs, working substantially the whole of the immediately preceding year, in the same or a neighboring

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place as that which the said J. D. Hibbs was working at the time of his death."

On the answers to those issues judgment was rendered awarding appellees the same amount as was awarded by the Industrial Accident Board.

The important question to be determined in this court is as to whether the jury was justified in finding that appellees were dependent in whole or in part upon the labor of their deceased son, J. D. Hibbs. The statute does not define "dependent" as used therein, but merely provides that the benefit of the insurance provided for therein shall be used for the benefit of dependents, among whom are "dependent parents." It is the contention of appellant that the evidence fails to bring appellees within the purview of the statute.

[1] It is agreed that the Midland Bridge Company was a subscriber to the Employers' Liability Act and carried a policy with appellant; that J. D. Hibbs, the son of appellees, was in the employment of the Midland Bridge Company on February 20, 1918, and was covered by the insurance policy of his employer; and that he was killed in the course of his employment on that date. Appellees owned no real estate, but were renters who had been working a parcel of land on "Jim Moore's place in Bastrop county" for 13 years. All the property of appellees consisted of a pair of mules, a pony, a cow and heifer, and a few farming implements. The deceased son was 19 years old when killed, and, there being a failure in crops in 1917, had gone to Houston to obtain temporary employment in order to buy himself much needed clothing. He had promised appellees, and fully expected, to return in time to assist his parents in making a crop in 1918. He had for a number of years been assisting his father in cultivating the rented place, and his mother in her labors about the house. It was in testimony that he did the work of a man on the farm. His mother and father had led a hard life and were failing in health and strength, and the dead boy not only was his father's chief help on the farm, but he carried water, milked the cow, cut wood, and fed the stock. He was the chief dependence of his parents.

It was not the intention of the Legislature to so limit the meaning of the word "dependent" that a parent must be a paralytic or otherwise totally incapacitated from obtaining the bare necessities of life in order to obtain the benefit of employers' liability insurance; nor did the Legislature intend that insurance companies could evade contracts by proof that a son was not at the very time of his death giving his wages to his parents, but had temporarily obtained employment in order to buy clothes for himself which the parents were too poor to supply and at the same time relieve them of the burden of furnishing food for him. He was to return in a short time to renew his labors on the farm. A temporary intermission in work, between seasons, would not in reason remove the dependency of the parents on his labor in caring for the farm. The facts of the Connecticut case of Blanton v. Wheeler & Howes Co., 91 Conn. 226, 99 Atl. 494, Ann. Cas. 1918B, 747, are not similar to those in this case. There was no intermission of six months in the dependency of the parents of the dead boy on his help and assistance, but he merely lifted the burden of buying his clothes and supplying his food from the already over-burdened shoulders of his parents, at a time when farm labor could not be performed. The deceased in this case was laboring to provide the necessities of life for his parents. The parents of a farmer boy could never be dependent on him if he was compelled to labor every day and hour of his life on the farm, and no definition given that would require such strictness and narrowness in the consideration of the word "dependent," as used in the Texas statute, will meet with favorable consideration by this court. We prefer the more humane and reasonable decisions which give a broader and more enlightened meaning to the word

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as used in statutes similar to the Texas statute. The Supreme Court of Georgia, in Railway v. Glover, 92 Ga. 132, 18 S. E. 406, held:

"Members of the same household, who live by their common labor and its proceeds, have a mutual dependence one upon another. Certainly so unless it is shown that a particular member consumes as much or more of the common stock than he contributes to it. Even that would not be a conclusive test, for the services of a child to a mother or a mother to a child may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependency may be in respect of personal service of this nature."

Again in the case of Fuller v. Inman, 10 Ga. App. 680, 74 S. E. 291, the same court said:

"It is utterly immaterial that the child does not earn sufficient money to support himself. If the mother gets the benefit of what he does earn, or of his labor, and she is dependent upon such labor or earnings for support, she has a right to recover for his negligent homicide. * * * If he performs substantial services of which she receives the benefit in and about the household, this is a contribution to her support, and she is dependent upon the child within the meaning of the law, without reference to whether he contributes one penny to her support. The statute deals with fact, not theory. It is the fact of contribution and the fact of dependency which creates the right of action."

[2, 3] The question of dependency is one of fact rather than a question of law, and each case must rest on its own facts. The test of dependency is, not whether the family could support life without the services or contributions of the deceased, but whether they depended upon them as part of their income or means of living. Bradbury, Workman's Compensation, pp. 571 to 573. All the cases seem to hold that partial dependency is all that is required, and a mere temporary intermission in the performance of services or the making of contributions will not destroy dependency. If so, a week's vacation or sickness for a time would cancel the contract of insurance. It has been held that a person may have been a dependent on another even though he had only sent money at irregular intervals and in irregular amounts. Bradbury, Work. Compensation, pp. 573, 574. The object of the statute is to help the relatives of a deceased person who may have been dependent on him, and its beneficent design should not be destroyed by technical construction and fine distinctions. The law would become almost a dead letter if insurance of the employe can be defeated by the subtle interpretation of the law advanced by appellants. The first assignment of error is overruled.

[4] The second assignment of error complains of the refusal of the trial judge to define the word "dependent" for the jury. The court asked the jury:

"Were the defendants, W. M. Hibbs and Carrie Hibbs, as parents of J. D. Hibbs, deceased, taking into consideration their condition and circumstances in life, dependent wholly or in part upon the labor of the deceased, J. D. Hibbs, for support at the time of the accident which resulted in his death?"

That question was clear and as open to the comprehension of an average jury as any number of definitions would have made it. The Legislature evidently did not deem it necessary to define a word so generally comprehended, for no definition of "dependent" is given in the statute. The definition of "dependent" asked by appellant was, if correct, coupled with matters not raised by the evidence such as benefits "which might be devoted to the establishment or increase of some fund which he might decide to lay aside, and does not cover donations or gifts." Such a charge would not have aided, but would probably have confused the jury. The second assignment of error is overruled.

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As hereinbefore concluded by this court, the evidence was sufficient to show that appellees were dependent parents of J. D. Hibbs, deceased, and the third, fourth, and fifth assignments of error are overruled.

[5] It was established by the evidence that the deceased, J. D. Hibbs, had been in the employment of the Midland Bridge Company for about three months or less, and not for a year, and it is provided by the Workmen's Compensation Act, herein cited, that—

An "injured employe who shall not have worked for a year, his average annual wages shall consist of three hundred times the average daily wage or salary which an employe of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or neighboring place, shall have earned in such employment during the days when so employed."

It is also provided, when it is impracticable to compute the average weekly wages, it shall be computed by the board in any manner that may seem just and fair to the parties. There was evidence tending to show that employes of the same class as young Hibbs had received for the entire preceding year $4 or more per day, and consequently appellees were entitled to recover 300 times the sum of $4. The evidence was sufficient to sustain the finding of the jury that $4 a day was earned by those of the same class as J. D. Hibbs, during the preceding year. The sixth assignment is overruled.

The judgment is affirmed.

GEORGIA CASUALTY CO. v. WARD et al. (No. 2241.)

(Court of Civil Appeals of Texas. Texarkana. May 13, 1920.)

221 Southwestern Reporter 298.

MASTER AND SERVANT—WHERE THERE WAS EVIDENCE OF INCAPACITY OF SERVANT TO FILE CLAIM FOR COMPENSATION, CAUSE SHOULD NOT BE DISMISSED, THOUGH INCAPACITY WAS NOT ALLEGED.

In an action for injuries to an employee where demand for compensation was not made within the time limited by the Workmen's Compensation Act and no allegation of incapacity was made, yet where there was evidence of incapacity the judgment should not be reversed and the cause dismissed on the employer's appeal, but the case should be remanded to the lower court for further proceedings.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

Appeal from District Court, Hunt County; A. P. Dohoney, Judge.

On motion for rehearing. Rehearing granted, and former opinion, which reversed and dismissed, modified and cause reversedand remanded.

For former opinion, see 220 S. W. 380.

Frank S. Anderson, of Galveston, for appellant.

B. Q. Evans, of Greenville, for appellees.

WILSON, C. J. As stated in the opinion filed February 26, 1920, while Ward was injured in June, 1916, he did not present a claim for compensation for the injury until March 13, 1918. By the terms of the Act April

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16, 1913 (Laws 1913, c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]), referred to in said opinion, Ward was excused from presenting such a claim within the time therein specified if and while he was physically or mentally incapacitated from making it. There were no pleadings by appellee suggesting such incapacity on Ward's part as excused him from making the claim before he did, but appellees insist in the motion there was evidence tending to show such incapacity, and therefore that after reversing the judgment we should have remanded the cause for further proceedings in the trial court, instead of here rendering judgment dismissing the suit. We have concluded that appellees' contention should be sustained in respect to the matter stated, and will set aside the judgment rendered here so far as it dismissed the case, and will, instead, direct that the cause be remanded to the court below for such further proceedings there as are authorized by law.

UINTAH POWER & LIGHT CO. et al. v. INDUSTRIAL COMMISSION OF UTAH. No. 3463.)

(Supreme Court of Utah. April 24, 1920.)

189 Pacific Reporter 875.

1. MASTER AND SERVANT—ALLOWANCE OF COMPENSATION TO DEPENDENTS FOR 252 WEEKS HELD PROPER.

It is within the discretion of the Industrial Commission, in fixing compensation for the death of an employee, to provide that it should be continued in favor of partial dependents for 252 weeks.

(For other cases, see Master and Servant, Dec. Dig. § 386[1].)

2. MASTER AND SERVANT—EMPLOYER CANNOT COMPLAIN OF COMPUTATION OF WAGE IF LESS THAN THAT REQUIRED BY COMPENSATION ACT.

Under Comp. Laws 1917, § 3142, making the basis of computation the average weekly wage at the time of injury, the basis of computation for an employee who at that time was working 6 days a week at a wage of $4 a day was $24, so that the employer and insurer could not complain of the computation on the basis of 300 working days a year which made the weekly wage less than $24.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

Action by Uintah Power & Light Company and another against the Industrial Commission of Utah to review an award by the Commission of compensation for the death of Alex A. Hunt. Award affirmed.

De Vine, Stine & Gwilliam, of Ogden, for plaintiffs.

Dan B. Shields, Atty Gen., and Jas. H. Wolfe, O. C. Dalby, and H. Van Dam, Jr., Asst. Attys Gen., for defendant.

WEBER, J. Before the Industrial Commission the parties stipulated the facts in the present case to be: On July 16, 1919, Alex A. Hunt, of Roosevelt, Utah, was fatally injured by reason of an accident arising out of and in the course of his employment while regularly employed at Roosevelt by the Uintah Power & Light Company, an employer subject to

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the provisions of the Workmen's Compensation Act (Laws 1917, c. 83). The wage earned by the deceased at the time of the accident was $4 per day, working 6 days per week. The Ocean Accident & Guarantee Corporation is the insurance carrier of the Uintah Power & Light Company. The dependents of the deceased are James Hunt and Margaret Hunt. In addition to the stipulation it was proved that James Hunt and Margaret Hunt were the parents of Alex Hunt, and that they wert partially dependent upon him.

At the hearing in January of this year the commission rendered its decision awarding to the parents of Alex Hunt compensation of $13.85 per week for a period of 252 weeks, not to exceed $3,490, and the sum of $156 burial expenses.

An application for rehearing, filed by plaintiffs, was denied. Plaintiffs have instituted this action to review the proceedings of the commission, and contend that the commission erred in computing compensation and that the award is excessive.

The evidence shows that during the year prior to his death Alex Hunt contributed $340 to the support of his parents. The commission found the parents partially dependent upon their son, and that conclusion was justified and supported by the undisputed evidence. It is asserted by plaintiffs, and admitted by defendant, that the computation by the commission was made in this manner: The daily wage, $4, multiplied by 300, the number of working days in the year, made $1,200. That sum divided by 52 makes the quotient, the amount of the average weekly wage, $23.07; and 60 per cent. of $23.07 is $13.85. This amount weekly for 252 weeks makes a total of $3,490.

[1] The allowance for 252 weeks only was because the parents were not wholly dependent. To designate that number of weeks, under the circumstances of this case, was clearly within the discretion of the commission.

[2] The rule used to ascertain the weekly wage may be, as plaintiffs claim, wholly arbitrary. In many states it is the statutory rule, and experience has shown that in the great majority of cases its results are fair and equitable to all parties concerned. If the rule were disregarded in this case, and the words of the statute followed, the amount allowed would have been greater. Comp. Laws Utah 1917, § 3142, provides for the following basis of computation:

"The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits."

The average weekly wage at the time of the injury, as shown by the stipulation, was $24. Sixty per cent. of that weekly wage would be $14.40. Allowing that amount for 252 weeks, the result would be $3,628.80.

The dependents, however, are not complaining. The employer and the insurance carrier have no cause for complaint.

The other objections urged by plaintiffs are without merit.

The award of the commission is affirmed, with costs.

Corfman, C. J., and Gideon and Thurman, JJ., concur.

FRICK, J. I concur. In view, however, that counsel for the insurance carrier very earnestly contend that the Industrial Commission has allowed excessive compensation to the parents of the deceased in this case, and in violation of the terms of our statute, it becomes necessary to construe the statute relating to the question of compensation. I therefore desire to add a few words to what has been said by Mr. Justice Weber.

The statute (Comp. Laws 1917, § 3142) provides:

"The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits."

Another section of the statute, in case death results from the injury, fixes the percentage of the weekly wage that shall be allowed to the dependents or to those only partially dependent upon the deceased and

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the length of time the payments shall continue, with certain limitations as to amounts. Counsel insists that in taking the weekly earnings of the deceased at the time of his death the commission arrived at a wrong result. They contend that the average weekly wage at the time of the injury means "the annual earnings of the deceased for the 12 months preceding the injury divided by 52." I cannot see how such a conclusion can be arrived at under the statute. The result no doubt would be the average earnings for each week of the entire year preceding the injury, but it might be much less or much more than the "average" earnings "at the time of the injury." While it is true that in the statute the words "average weekly wage" are used, it is also true that those words are qualified by what, it seems to me, are the controlling words, namely, "at the time of the injury." All the words of the statute must be given their ordinary and usual meaning, and all the qualifying words must be considered and construed together. The basis of compensation, therefore, is the average weekly wage that the injured person earned at the time of the injury. As pointed out by Mr. Justice Weber, the earnings of the deceased at the time of his injury were $4 per day, and he worked 6 days a week. But one result is possible, therefore, in this case, so far as fixing the weekly wage is concerned; and when that is fixed the amount to be allowed necessarily follows as a mathematical result.

Counsel urge, however, that in arriving at the result the word "average," as used in the statute, was disregarded and given no effect whatever. In making the contention counsel evidently have overlooked the fact that the statute is intended to cover all kinds of cases. The employe may work daily at a fixed wage and at the time of his injury he may, for a term of years or months, have worked at the same rate. If that were so, there is nothing either gained or lost by attempting to average his weekly wage. Another employe may, however, work only intermittently and irregularly, and that may be the regular course of his employment. In that way he may work 3 days in one week, 4 days in the following week, and so on. Again, an employe may do piecework, or work for a commission, and in that way his earnings may fluctuate so that the week in which he was injured he may have earned considerably more than he did in the preceding one or might earn in the following week, or the earnings may have been considerably less, and yet his regular earnings from week to week may not vary very much as to amount. Moreover, the employment may be such that the number of hours of work may change from day to day, or week to week, and at times the employe may be required to work overtime, and yet the amount of the earnings may not greatly vary from week to week and still may do so from day to day. Further, the employe may work for a monthly wage which may be at a uniform rate, or, for the reasons stated above, his earnings may fluctuate from month to month. If, therefore, the employe works intermittently, or if his wages fluctuate, as suggested, the commission must arrive at the "average weekly wage" at the time of the injury by such method of computation as in their judgment will effectuate the purpose of the framers of the statute. One thing, to my mind at least, is clear, and that is that the framers of the statute did not intend that the earnings of the injured person should be either enlarged or diminished because he may have worked for either a larger or smaller wage at some time prior to the injury in some other or in the same employment. The statute assumes that the average wages earned at the time of the injury will continue indefinitely, and hence the earnings at that time were made the basis of computation.

In view of the stipulated facts, I cannot conceive how the Industrial Commission could have arrived at a conclusion more favorable to the insurance carrier in this case than it did. If the application of the statute results in inequalities and does not reflect justice in all cases, the Legislature, and not the courts, should be appealed to to correct the evil.

The award of the commission should be affirmed.

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COLETRANE v. OTT, WORKMEN'S COMPENSATION COMMISSIONER. (No. 4047.)

(Supreme Court of Appeals of West Virginia. April 13, 1920.)

103 Southeastern Reporter 102

(Syllabus by the Court.)

1. MASTER AND SERVANT—EMPLOYE'S WIDOW CONCLUSIVELY PRESUMED TO BE DEPENDENT WITHIN COMPENSATION ACT.

The widow of a deceased employé is conclusively presumed to be a dependent within the meaning of our workmen's compensation law, and is entitled to participate in the fund unless deprived thereof under the provisions of section 36 of the act, chapter 15p, Barnes' Code 1918 (Code, § 692).

(For other cases, see Master and Servant Dec. Dig. § 388.)

2 MASTER AND SERVANT—NONRESIDENT WIDOW SUPPORTED BY EMPLOYE HELD ENTITLED TO PARTICIPATE IN WORKMEN'S COMPENSATION FUND; "ABANDONED;" "LIVING SEPARATE."

Where the widow of deceased employé has continued to reside in another state in a home provided and paid for by him, and where he has continued to contribute to her support by money and clothing for the whole period of his absence, including the twelve months next preceding his death, and where he has continuously visited her and her children by him, though at intervals of one or two years only, and during the entire term has continued to write her on an average of twice each month, sending money and clothing, and professing love and affection and proffering continued support, they are not living separate and apart, nor has he abandoned her nor failed to contribute to her support so as to deprive her, under said section 36, of right to participate in said workmen's compensation fund.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Abandon.)

3. MASTER AND SERVANT—NONRESIDENT WIDOW OF EMPLOYE CONTRACTING BIGAMOUS MARRIAGE HELD ENTITLED TO PARTICIPATE IN WORKMEN'S COMPENSATION FUND.

Nor will the fact that such deceased employé may during his sojourn here have contracted a bigamous marriage with another woman and cohabited with her in this state in any way operate to affect or deprive his lawful wife of participation in the workmen's compensation fund.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Petition by Nannie McCain Coletrane against Lee Ott, Workmen's Compensation Commissioner, to review record on which the petitioner was denied participation in the workmen's compensation fund. Order of Compensation Commissioner reversed, and decision directed to be certified to him for further action.

Anderson, Strother, Hughes & Curd, of Welch, for petitioner.

E. T. England, Atty. Gen., and Frank Lively, Asst. Atty. Gen. for respondent.

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MILLER, J. Petitioner, residing in North Carolina, and representing herself to be the widow of William, or Madison, Coletrane, who died as the result of injuries sustained while employed in a coal mine in this state, was denied participation in the workmen's compensation fund by the defendant, on the ground that it was not proven she was dependent on the deceased at the time of his death, for support.

In her application filed before the commissioner, duly sworn to, and in affidavits and exhibits filed, petitioner showed she was fifty-six years of age, was first married to the deceased October 29, 1885, in Randolph County, North Carolina, by whom, between that date and the year 1891, she had borne four children, one dead, three living; that in the latter year her husband came to West Virginia to obtain work, and where he had remained until the date of his death, but that during the whole of the interval she had continued to reside in a home purchased and paid for by him in North Carolina, and that he had continuously supported or contributed to her support there; that in the year 1897 she obtained a divorce from him in the state of North Carolina, on the ground of desertion, but on December 29, 1902, she was re-married to him and had never since then been divorced; that after her second marriage she continued to reside and remain in the home so provided by her husband, where he visited her occasionally, once every one or two years, and that he had continuously thereafter supported her or contributed to her support; that during the year immediately preceding his death he had contributed as much as $120.00 thereto. And she proved that continuously he had kept up a correspondence with her, writing her on an average of about twice a month, and as evidence thereof she exhibited a number of letters received, others having been lost or destroyed, showing remittances of money and expressions of love and affection for her and his children, and representing his intention to bring her to West Virginia, and that he was endeavoring to buy and pay for property in this state, so that he might have something to leave them after his death. She also proved by the records in North Carolina her first and second marriage to deceased; and there was nothing offered in evidence to the contrary.

However, it had been brought to the attention of the commissioner that one Annie Coletrane, formerly Annie Mays, claimed compensation as the widow of the deceased; and there was evidence before the commissioner, on her application, of her marriage to William Coletrane, in McDowell County, in 1910, with whom she continued to live in said county until the date of his death, but under bigamous relations as petitioner contends.

On being advised of the action of the commissioner in denying her compensation, petitioner made application for a reopening and rehearing of the case, and presented therewith additional affidavits and letters received by her from him showing contributions to her support, and also the record of the county court of McDowell County showing the appointment by that court of an administrator of the estate of her deceased husband upon her motion and a denial of administration on the application of the said Annie Coletrane, or Annie Mays; but such rehearing was denied by the commissioner, assigning as ground therefor that the new evidence was not sufficient to justify a reopening of the case or further consideration thereof.

Complaint is made by counsel for petitioner that defendant took up and decided the case without their knowledge or notice to the petitioner before her right to file evidence had been barred by the statute. But as we view the case, the commissioner did so far consider the evidence as to dispose of the rights of the petitioner thereon and to bring the matter before us for review on the whole record.

[1, 2] The question thus presented to us is whether petitioner as widow of deceased is entitled to compensation out of the workmen's compensation fund. That she was the lawful wife of deceased at the time of

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his death must be regarded as fully established by the proof. What the rights of the other claimant may be is a question not now before us, and can only be collaterally considered, if at all, in the disposition of the claim of petitioner. Petitioner proved she had no knowledge whatever of the relations existing between her husband and the said Annie Mays until after his death. On the other hand it is urged that the said Annie Mays must have had knowledge of the relations of the petitioner to the deceased through letters received by him from her; but this assumption is based on the presumption that her letters to her husband were delivered at the place where they cohabited in McDowell County and that she must have obtained such information therefrom; but this is the presumption of a fact not fully established. The fact, however, we think, is not material so far as petitioner is concerned.

Our statute, paragraph (f), section 33, chapter 15p, Code 1918 (Code Supp. 1918, § 689), defines "dependent, as used in this act," to mean "a widow, widower," etc. Generally considered, therefore, by the very terms of the statute, a widow unless in some way deprived of her right, is a dependent within the meaning of the law and entitled to participate in the workmen's compensation fund, and the fact that her husband may not have supported her in all respects as it was his duty to do, and as a good and dutiful husband should have done, can not deprive her of her rights. Presumptively a widow is a dependent, not only under the statute, but at common law, and it is the duty of the husband to support her; the statute recognizes this right in its definition of "a dependent." The evidence of petitioner is that she was wholly dependent on deceased for support except for what little she made in occasional odd jobs.

The attorney general, however, in support of the decision of the commissioner relies on section 36 of the workmen's compensation law (Code, § 692), providing:

"Notwithstanding anything herein contained, no sum shall be paid to a widow or widower who shall have been living separate and apart from, or have been abandoned by the employe for twelve months next preceding the injury, and who shall not have been supported by him or her during such time."

Plainly the statute deprives the widow of compensation if she shall have been living separate and apart from, or has been abandoned by the employe for the period named, and has not been supported by him for twelve months preceding his death. What amounts to living separate and apart, or abandonment, within the terms of the statute, are questions to be determined by the court, having reference, however, to all the provisions of the statute. Can a wife who has been provided with a home by her husband and is visited and supported by him as is proven in this case, be said to be living separate and apart from him, although he has been absent for a greater part of the time working in another state, and though he has for a part of the time lived in bigamous relations with another woman unknown to his wife? We doubt whether our statute should be given such constrution. A decision of this question, however, is hardly necessary to a proper disposition of this case, but it is somewhat involved in the question of abandonment covered in the alternative by our statute. Could a husband be said to have deserted or abandoned his wife under the facts and circumstances assumed and proven in this case, which would justify a decree of divorce in a suit by her against him, We think not. It was decided by this court in an earlier case that desertion cannot be inferred from the mere fact that the parties do not live together, as by the fact that the husband gives the wife only meager support or puts her in a house separate from his ordinary residence, so long as he does not break off the matrimonial cohabitation. Desertion cannot be predicated on such facts. There must be intent to desert on his part. Burk v. Burk, 21 W. Va. 445; Alkire v. Alkire, 33 W. Va. 517, 11 S. E. 11; Martin v. Martin, 33 W. Va. 695, 11 S. E. 12; Tillis v. Tillis, 55 W. Va. 198, 46 S. E. 926; Bacon v. Bacon, 68 W. Va. 747, 70

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S. E. 762; Hall v. Hall, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.) 758; Crouch v. Crouch, 78 W. Va. 708, 90 S. E. 235. In Wisconsin, where the statute required that the wife should have been wholly dependent on the husband with whom she was living at the time of his death, it was decided that the terms of the statute should be given their practical and popular meaning, and that the statute of that state was intended to cover cases where there was no break in the marriage relations although there might be a physical separation of the parties by time and distance. Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, and note, Ann. Cas. 1915B, 877. In Massachusetts the statute (Laws 1911, c. 751, § 7) provided that the "following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employe: (a) A wife upon a husband with whom she lives at the time of his death," etc. The industrial commission construed this statute to include a wife who was justified in law to leave her husband and who sought the protection of her rights in every possible way and endeavored to secure his support, and that she was entitled to compensation. The Supreme Court was of opinion that this ruling was wrong. That court held that living together in the ordinary acceptation of these words in common understanding meant maintaining a home and living together in the same household, or actually cohabiting under conditions which would be regarded as constituting a family relation. Citing two previous Massachusetts cases. Gallagher's Case, 219 Mass. 140, 106 N. E. 558. After that decision the Legislature amended the act so as to include a wife living apart for justifiable cause or because her husband had deserted her.

In the case at bar the husband provided and maintained the home for his wife and children, contributing to their support and his letters and conduct, outside of his bigamous relation with the other woman, negative every intention to abandon and desert the petitioner. His bigamous relation with another woman in West Virginia cannot be accepted as evidence of intent to abandon his lawful wife, particularly when he manifested contrary intention by writing avowals of his continued love and disposition to support and maintain her.

Furthermore, to deprive petitioner of her right to compensation, she must not only have been living apart from her husband, or abandoned by him, but in the conjunctive she must not have been supported by him during the twelve months preceding his death. The evidence is conclusive in this case that the deceased did give support to his wife, not only by a home provided for her, but by clothing and money sent her; and if she had any other support it consisted of small earnings from occasional employment by others. Properly construed, therefore, we do not think the statute deprives her of the compensation which the previous provision of the statute gives her as a wife and dependent.

[3] But it is urged that the subsequent marriage of Coletrane in West Virginia, according to the forms of law in this state, was presumptively valid, and under the facts and circumstances of his relation to petitioner, made his later marriage valid, and that the assumed burden upon petitioner to show the invalidity of that marriage has not been borne by her. We do not think this position tenable. Petitioner certainly established a prima facie case of the invalidity of this second marriage, and that the relationship of the deceased to Annie Mays was bigamous and adulterous. The presumption indulged in by many courts as to the validity of second marriages has in this case been overcome by proof of its invalidity. Pittinger v. Pittinger, 28 Colo. 308, 64 Pac. 195, 89 Am. St. Rep. 193, and note. It is laid down as law in 26 Cyc. 848, supported by numerous decisions cited in notes, that:

"The marriage of a man or woman, where one of them has a husband or wife, by a prior valid marriage, who is then living and undivorced, is void and not merely voidable, whether it is meretricious or founded in mistake, or although the facts are sufficient to raise a presumption of

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the death of the former spouse, and although the offending party will be protected from criminal prosecution."

According to these authorities, whatever may be the rights of the innocent party to a second marriage in a criminal prosecution or otherwise, the unlawful relationship established by the second marriage unknown to the spouse involved in the lawful marriage cannot deprive her or him of their legal rights to compensation under the workmen's compensation law.

For these reasons we are of opinion to reverse the order of the Compensation Commissioner, and to direct that this decision be certified to him as provided by section 43 of the Workmen's Compensation Act (Code Supp. 1918, § 699), for further action by him in the premises as required thereby.

BRUNETTE v. BRUNETTE.

(Supreme Court of Wisconsin. May 4, 1920.)

177 Northwestern Reporter 593.

2. MASTER AND SERVANT—INDUSTRIAL COMMISSION NOT A COURT.

The Industrial Commission under the Workmen's Compensation Act is an administrative body, and not a court, having no powers other than those granted it by the statutes of its creation, and no power to certify or send proceedings brought before it to any court or other tribunal.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

3. MASTER AND SERVANT—STATUTE RELATING TO ACTION TO BE TAKEN WHERE PLANTIFF HAS MISTAKEN REMEDY INAPPLICABLE TO INDUSTRIAL COMMISSION UNDER COMPENSATION ACT.

Proceedings brought by an injured servant before the Industrial Commission under the Workmen's Compensation Act cannot be held to be the situation contemplated by Stats. § 2836b, under which, when it appears to a court that a party claiming affirmative relief or damages has mistaken his remedy, his proceeding or action shall not be finally dismissed or quashed, but he shall be allowed a reasonable time within which to amend, or, in case the court has no jurisdiction to grant the relief sought, then the action, or a divisible part thereof, may be certified to some other court which has jurisdiction, and a dismissal of proceedings before the Industrial Commisison cannot be considered in substance or effect as analogous to such a nonsuit in a court of jurisdiction after which a second suit for the same cause of action may be instituted, and the first cause be considered as a substantial compliance with Statutes § 4222 (5), requiring notice of claim for damages to be served within two years on party causing injury.

(For other cases, see Master and Servant, Dec. Dig. § 394.)

Appeal from Municipal Court, Brown County; N. J. Monahan, Judge.

Action by John Brunette against Emanuel Brunette. Judgment for defendant, and plaintiff appeals. Affirmed.

On or about September 15, 1915, the plaintiff while employed by defendant, his brother, as farm hand on the latter's farm, injured his shoulder

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in a fall which occurred when he was climbing up through a chute to the upper floor of defendant's barn. The injury interfered with his performing his usual services until the time he left defendant's employ ten days later. He was then examined by a physician, who thereupon notified defendant by letter of the injury. The defendant called at the doctor's office and saw the plaintiff and doctor, and was then and there informed of the details of the accident as claimed by plaintiff. On October 4th the defendant reported the accident to the Industrial Commission saying as follows:

"No one saw the accident, but the man says he was going up into the hay loft when he fell down to the floor. Party kept on working until Saturday, September 25th, and I knew nothing of the accident until I got the letter from the doctor telling me about it."

On October 25th the plaintiff was reported by the physician as being cured, and on the 15th day of November, 1915, he was paid by an insurance company on behalf of defendant $65.64, including $37.50 for doctor's bill.

On August 21, 1916, plaintiff was examined by another physician, and it was then disclosed that there was an atrophy of the shoulder muscles which resulted in a permanent substantial impairment in the use of the arm.

On January 18, 1917, the plaintiff made application to the Industrial Commission for compensation on one of the usual blanks, giving the date of the accident as April, 1916, instead of the correct date, September 15, 1915.

A notice was issued by the Industrial Commission setting a hearing of said matter for March 2, 1917, which notice was sent by mail, together with a copy of plaintiff's application, and both were received by defendant prior to said March 2d. Defendant appeared on such hearing and denied any injury to the plaintiff in the course of his employment in April, 1915, or at any ohter time. An examination of its record by the Industrial Commission disclosed the fact that at the time of the injury in September, 1915, defendant was not then or until November 1, 1915, under the Workmen's Compensation Act (Laws 1911, c. 50). The claim of the plaintiff was thereupon dismissed by the Industrial Commission. On March 1, 1918, the summons and complaint herein were served upon the defendant.

Upon the issues framed the jury found that hte defendant did not use ordinary care in furnishing a safe place for plaintiff to perform his services, that such want of ordinary care was the proximate cause of the injury, that there was no want of ordinary care and no assumption of risk on plaintiff's part, and assessed his damages at $2,000.

After verdict and upon several motions made upon the testimony and the pleadings the court granted defendant's motion for judgment on the ground that there had been no compliance by the plaintiff with the provisions of section 4222(5), Stats., which had been asserted as a defense, dismissed the complaint. From judgment of dismissal the plaintiff has appealed.

Silverwood, Fontaine & McCreery, of Green Bay, for appellant.
Kittel & Jaseph, of Green Bay, and James T. Drought, of Milwaukee, for respondent.

ESCHWEILER, J. (after stating the facts as above). Section 4222, Stats., which is the provision prescribing the general limitation for commencing an action within six years after the accrual of the cause thereof, contains in subdivision 5 of said section the following provision, which is the only part material for consideration here:

"No action to recover damages for an injury to a person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation

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by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record. No such notice shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the description of the injuries, the manner in which they were received or the grounds upon which the claim is made, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby. * * * When an action shall be brought and a complaint actually served within two years after the happening of the event causing such damages, the notice herein provided for need not be served."

The plaintiff appellant contends that there has been a substantial compliance on his part with the terms of the above statute as to the giving of notice within the two years subsequent to the injury, or else that defendant should be held estopped by his conduct from relying upon that statute, and lastly that in any event the bringing of the proceedings in January, 1917, for compensation before the Industrial Commission is in effect the bringing of an action and serving of a complaint within the last sentence of the above-quoted portion of section 4222(5), Stats.

Plaintiff's right to recover, if at all, in this action, is not founded upon the breach by defendant of any of the statutory provisions relating to master and servant, but solely for an alleged breach of the common-law duty of the defendant to furnish plaintiff a reasonably safe place to work.

The right to compensation for industrial injuries under the Workmen's Compensation Act (sections 2394—1 to 2394—32, Stats., inclusive) is purely a statutory right as distinguished from the common-law right. Although many of the cases in which compensation is allowed under this act involve situations in which there is at the same time a breach by the employer of his common-law duties and obligations towards his employe and for which identical injuries the employe might have, except for this act, a valid ground for recovery of consequent damages at common law, nevertheless the theory and purpose of the Compensation Act is to make up as nearly as possible to him who has been injured in an industrial pursuit the consequent loss to him irrespective of any questions as to negligence as defined at common law.

[1] A notice therefore of the claim for compensation based upon the statutory right conferred on the injured employe by the Workmen's Compensation Act is a distinct and different claim and demand than one made for damages for an alleged breach by and the consequent liability of the employer under the principles of the common law.

The defendant had actual knowledge from the interview with the plaintiff and his doctor after the injury and before October 2, 1915, at which time defendant made his report of the accident to the Industrial Commission, of the time and place and manner of the injury, but that situation, together with the subsequent proceedings and notices before the Industrial Commission, cannot be considered as a substitute for the essential conditions under subdivision (5) of section 4222, Stats., above quoted, of a written notice signed by the person injured or on his behalf stating the ground upon which claim is made and that satisfaction thereof was claimed of the defendant.

Neither can the receipt signed by plaintiff in November, 1915, at the time he was paid compensation on behalf of defendant by the insurance company, be considered as in any wise supplying this want or aiding, with the other writings before the Industrial Commission, including defendant's own report of October 2, 1915, in making a substitute for a notice that a claim was intended to be made against the defendant on the

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entirely distinct ground of an alleged breech of his common-law duty. Staszczuk v. Gilman Mfg. Co., 159 Wis. 615, 150 N. W. 982.

There having been nothing, therefore, in the record which could be construed in any manner as a compliance with the provision as to giving of a written notice to defendant with reference to this injury within the purview of the statute above quoted, it necessarily follows that there is no application for the rule as to a waiver of the giving of any such notice as in such cases as Guile v. La Crosse G. & E. Co., 145 Wis. 157, 170, 130 N. W. 234, where it was found by the jury that express representations were made by defendant's officers that no further notice of the injury than that which they already had was necessary, or of Maurer v. Northwestern Iron Co., 151 Wis. 172, 138 N. W. 636, where there was an express admission of the receipt of an informal notice and a statement that no further notice would be necessary.

The court expressly stated in his written decision disposing of the motions after verdict that there was no evidence of any representation made by defendant to plaintiff that he need serve no notice of injury in order to preserve his rights in this regard, and such conclusion is fully warranted by the record. There is nothing that could be reasonably construed as fraud or deceit on the part of the defendant tending to lull the plaintiff in any manner into the belief that the statutory prerequisites to his right to claim damages on the ground of the alleged breach of the common-law duty of defendant towards him were being waived. Smith v. C., M. & St. P. Ry. Co., 124 Wis., 120, 102 N. W. 336. See, also, Uhlenberg v. Mil. G. L. Co, 138 Wis 148, 151, 119 N. W. 810.

The plaintiff appeared by attorneys before the Industrial Commission in the proceedings started by plaintiff in January, 1917. There still existed the period between the dismissal thereof in March and September 15, 1917, the two years subsequent to the injury, within which timely notice might have been given or action commenced, by either of which methods plaintiff's rights might have been preserved as against the conditions prescribed in section 4222(5), Stats., supra. Nothing was done, however, by plaintiff or on his behalf in this interim other than possibly some general conversation between the attorneys of the respective parties, and defendant cannot be charged witth plaintiff's failure to take either of such steps during that interval.

[2] The Industrial Commission under the Workmen's Compensation Act is an administrative body, and not a court. It has no powers as such body other than those granted it by the statutes of its creation, and it has no power of certifying or sending proceedings brought before it to any court or other tribunal.

[3] The proceedings therefore brought before it cannot be held to be the situation contemplated by section 2836b, under which, when it appears to a court that a party claiming affirmative relief or damages has mistaken his remedy, his proceeding or action shall not be finally dismissed or quashed, but he shall be allowed a reasonable time within which to amend, or, in case the court has no jurisdiction to grant the relief sought, then the action, or a divisible part thereof, may be certified to some other court which has jurisdiction. Its application is illustrated in such cases as Cronin v. Janesville, 163 Wis. 436, 158 N. W. 254, Komorowski v. Jackowski, 164 Wis. 254, 159 N. W. 912, or of Dring v. Mainwaring, 168 Wis. 139, 169 N. W. 301, where proceedings in one court were permitted to be changed in form and substance or certified to another court which may more properly assume jurisdiction, but it cannot avail the plaintiff here.

By parity of reasoning neither can the dismissal of the proceedings before the Industrial Commission in March, 1917, be considered in substance or effect as analogous to such a nonsuit in a court of proper jurisdiction after which a second suit for the same cause of action may be instituted and the first cause be considered as a substantial compliance

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with the last sentence of the second 4222(5) quoted above, as was held in the cases of Odegard v. North Wis. L. Co., 130 Wis. 659, 110 N. W. 809, or in Wawrzyniakowski v. H. & B. Mfg. Co., 146 Wis. 153, 158, 131 N. W. 429.

Plaintiff having failed to comply with the provisions of section 4222(5), he lost the right of action asserted in this case, and the court below properly directed judgment for the defendant.

This disposition of the case renders it unnecessary to consider any other questions presented on this appeal.

Judgment affirmed.

Winslow, C. J., and Kerwin, J., took no part.

KALASHIAN v. HINES, DIRECTOR GENERAL OF RAILROADS.

(Supreme Court of Wisconsin. May 4, 1920.)

177 Northwestern Reporter 602.

2. COMMERCE—RAILROAD'S EMPLOYE INJURED IN INTERSTATE COMMERCE CAN RECOVER UNDER FEDERAL LIABILITY ACT.

A railroad's servant injured while engaged in repairing a track, which was an instrumentality in interstate commerce, had a right to recover under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657—8665), rather than the state Workmen's Compensation Act.

For other cases, see Commerce, Dec. Dig. § 8[6].)

9. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF RAILROAD EMPLOYE HELD NOT SOLE CAUSE OF INJURY.

Though an injured servant suing under the federal Employers' Liability Act (U S. Comp. St. §§ 8657—8665) himself was negligent, negligence by his employing railroad also having been found, his negligence cannot be deemed the sole proximate cause of his injury.

(For other cases, see Master and Servant, Dec. Dig. § 247 [1].)

Appeal from Circuit Court, Fond du Lac County; Chester A. Fowler, Judge.

Action by John Kalashian against W. D. Hines, Director General of Railroads, operating the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff, a railroad section man in defendant's employ, was on May 20, 1919, at about half past 3 o'clock in the afternoon, in defendant's yard at North Fond du Lac, run over by a switch engine, losing both legs. He was about 37 years of age, by birth an Armenian, and had been in this country 5 years. He was able to talk but slightly, if any, in any language than that of his birth, and could not read or write. He had been employed as section man for theMinneapolis, St. Paul & Sault Ste. Marie Railway Company for about 3 months prior to the injury and had had about 4 years experience as such section man.

In the switchyards in question there were maintained three main lead tracks running substantially north and south at a point where they were

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diagonally intersected by a public highway called the Lake Shore Drive. The yard was used for the breaking up and making up of freight trains, and the plaintiff was familiar with the situation and use of said tracks, and during the period of his employment had been living in a bunk car within a few feet of the track and but a short distance from the point where he was injured. The ground at this location was level, and there were no buildings or other obstructions to the sight so far as the switch engine in question and the location involved in his accident are concerned. On the afternoon in question, the secton crew with which he was working were required to load material and tools on their hand car at the place where it was then located south of the Lake Shore Drive and just a little to the east of the most easterly of the tracks.

The foreman of the crew was in a toolhouse which was located west of the tracks and just north of the Lake Shore Drive, and the plaintiff was there given by such foreman a keg of railroad spikes, weighing about 25 pounds, which he carried in his arms in front of his body at the same time having, as he testifed, his maul on one arm. He was directed by the foreman to proceed in a hurry towards the hand car at which were already one or more of his fellow section men. He started from the toolhouse in a southeasterly direction toward the hand car. As he stepped out of the toolhouse, his testimony is to the effect that he looked to the north and saw the switch engine in question then coupled to several cars but standing at a point at least 60 feet north of the said Lake Shore Drive. The distance of the hand car was about 200 feet from the toolhouse. He did not look again toward the switch engine. Just as he was stepping over the west rail of the center of the three lead tracks and at a point 144 feet from the door of the toolhouse from which he started and from which he had been approaching the track at an angle of about 30 degrees, he was struck by the switch engine coming from the north, resulting in his injury. The switch engine with seven or eight cars attached stopped within about 25 feet after so striking the plaintiff. The point where the accident occurred was 119 feet south from the crossing of the center track with the Lake Shore Drive, and the width of that highway was 60 feet.

The place where it was planned to go with the section crew of which plaintiff was a member, together with the material which was being taken to the hand car, was to a transfer track about 300 feet long between the Sault line and the St. Paul Railway about a mile and a half from where the accident occurred. The purpose in so doing was to repair such transfer track which had become out of order by reason of an engine having been derailed thereon.

Defendant's records were produced by plaintiff on the adverse examination of one of defendant's clerks, and it appeared therefrom that for a period of at least a month prior to the time of the injury loaded freight cars received from points without the state of Wisconsin and consigned to firms in Fond du Lac were almost daily moved over such transfer track. After a number of such records had been offered on plaintiff's behalf, the court then suggested to plaintiff's counsel, "Haven't you gone far enough with this?" to which suggestion plaintiff's counsel acceded, and defendant's counsel said, "That is all." The court then said:

"I don't see that there is any question about the proposition that this is a connecting track used indiscriminately for interstate purposes."

No objection was interposed by defendant to such disposition of the question, and no testimony was offered by defendant as tending to impeach or contradict the effect of such record testimony as to the transfer track being used for switching cars containing shipments of interstate freight.

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But two of the several grounds of negligence alleged in the complaint were submitted to the jury by the trial court in the special verdict. By such special verdict the jury found as follows:

(1) The engine crew did not use ordinary care in respect to keeping a lookout ahead as they approached the plaintiff.

(2) The engine crew did not use ordinary care in respect to ringing the bell as they approached the plaintiff.

(3) That such want of ordinary care thus found was the proximate cause of plaintiff's injury.

(4) That there was a want of ordinary care on plaintiff's part that proximately contributed to produce his injury.

(5) That plaintiff's negligence contributed to his injury in the proportion of 40 per cent. as compared to the total negligence of the engine crew and his own negligence.

(6) The plaintiff did not know that the engine crew were likely to move the engine south of the road without ringing the bell.

(7) The plaintiff did not know that the engine crew were likely to move the engine south of the road wihout keeping a lookout ahead.

(8) "Would a person of plaintiff's experience, information, intelligence, and knowledge of the English language have known, in the exercise of ordinary care, that the engine crew was likely to move the engine south of the road without ringing the bell? Ans. No."

(9) A question similar to No. 8, but inquiring as to the moving of the engine without keeping a lookout ahead, which was also answered no.

(10) $25,000 will compensate the plaintiff for his injuries.

After respective motions by the parties, the court direceted a verdict in favor of the plaintiff for 60 per cent. of the amount of the verdict with interest, cost, and disbursements.

From the judgment entered in accordance therewith defendant has appealed.

W. A. Hayes, of Milwaukee, and John F. Kluwin, of Oshkosh (T. L. Doyle, of Fond du Lac, and Paul Stover, of Milwaukee, of counsel), for appellant.

Barton & Kay, of St. Paul, Minn., and Walter D. Corrigan, of Milwaukee, for respondent.

ESCHWEILER, J. (after stating the facts as above). The substance of appellant's contention on this appeal is:

(1) That the plaintiff was not so employed in interstate commerce as to bring his right of action within the federal Employers' Liability Act, and that his sole right was under the provisions of the Workmen's Compensation Act of Wisconsin (St. 1919, § 2394—1 et seq.).

(2) In submitting to the jury any question as to alleged negligence on the part of the defendant as a proximate cause of the injury and in sustaining their verdict in so finding.

(3) In failing to hold as a matter of law and in sustaining the verdict of the jury in finding that the plaintiff's negligence was not the sole cause of his injury.

(4) In failing to hold as a matter of law that the injuries which the plaintiff received were by reason of a risk which he had assumed under his employment.

(5) For the court's failure to submit a question, in the special verdict, as to the assumption of risk and in submitting questions 8 and 9 above specified, and in failing to give appropriate instructions as to the assumption of risk and giving erroneous instructions on the question of defendant's alleged negligence.

It must be considered as an accepted fact in this case that at the time of the injury the plaintiff was, within the scope of his employment, pro-

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ceeding to the hand car for the purpose of immediately going with the rest of the section crew to repair a portion of the tracks used by the Sault Railway in interstate as well as intrastate traffic.

[1] The evidence from defendant's own records as to the character of freight that was being transported practically daily over this transfer track, and further offer of such class of testimony being stopped at the suggestion of the court as quoted from the record, and the evident acquiescence by defendant's counsel at that stage of the case with the ruling of the court, makes it clear that it was not disputed on the trial, and cannot now be urged, that the track proposed to be repaired was not clearly an instrumentality used in interstate commerce. It was as much so as was the bridge at which the injured plaintiff was employed in carrying spikes in the case of Pedersen v. D. L. & W. Ry. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, or where the injured employe was removing snow between tracks used for both kinds of traffic, N. Y. Cent. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536. and the ruling in those cases we consider binding upon us in the instant case. The following cases also are in point: L. & N. R. R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119; So. Ry. Co. v. Puckett, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69; P. B. & W. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed, 869; Frazier v. Hines (D. C.) 260 Fed. 874; Kansas City S. R. Co. v. Martin (C. C. A.) 262 Fed. 241.

[2] It is therefore held in this case that the plaintiff's right to recover was under the federal act rather than the Wisconsin Workmen's Compensation Act, and the rulings of the court below in that regard were proper and are upheld.

[3] In a case like this under the federal liability act, questions of either plaintiff's or defendant's negligence in connection with the injury are controlled by the principles declared by the federal courts rather than those of the state courts. Y. & M. B. R. Co. v. Mullins, 249 U. S. 531, 39 Sup. Ct. 368, 63 L. Ed. 754; N. O. & N. E R. Co. v. Harris, 247 U. S. 367, 371, 38 Sup. Ct. 535, 62 L. Ed. 1167; N. Y. Cent. & H. R. R. R Co. v. Tonsellito, 244 U. S. 360, 37 Sup. Ct. 620, 61 L. Ed. 1194; So. Ry. Co. v. Gray, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030; Frazier v. Hines (D. C.) 260 Fed. 874, 880.

Although it may be said in passing that no substantial difference appears in the rulings in this state upon the questions here involved and the rulings of the federal courts.

[4] The case was correctly submitted to the jury under the evidence in this record as to the questions of the alleged negligence on the part of the crew in charge of the switching engine as embodied in the first and second questions of the special verdict.

The conflicting testimony in this case was such that it made it proper for the jury rather than the court to determine where the truth lay with reference to the following situations:

First, whether, when plaintiff started from the toolhouse towards the hand car in a diagonal direction leading to and across defendant's tracks, the switch engine was 60 feet or more north of the highway crossing, or whether it was just momentarily stopped on the crossing itself to permit of the very brief operation of uncoupling one or more cars from the set of cars then being switched; and whether it was in a state of rest at the time the plaintiff so started.

Second, whether or not the bell on the locomotive was ringing as the switch engine was going south and over the space between the highway crossing and the point of injury.

Third, whether it was the custom in this particular switchyard that a warning by the ringing of the bell should be given as such switch engines were in motion under circumstances similar to those shown in this case, or whether it was a custom restricted to the giving of such

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warning when the engine was just starting to move, at highway intersections and when persons, employes or others, were discovered by the engine crew on the roadbed and at or near a point of danger.

It is a conceded fact under the plaintiff's own testimony that he was familiar with switching operations, the constant moving of switch engines up and down those tracks, and the likelihood of such engines being so in operation while he was so crossing the tracks, and that he did not look towards the switching engine after leaving the tool-house. It must also be treated as a conceded fact that, had he looked at or just before stepping upon or within two or three feet of the west rail of the center track, he could have seen the approaching engine and have avoided the accident.

It also appears that the engine was backing to the south at the time of the accident, and that the engineer was on the opposite side of the engine from that on which the plaintiff was approaching, and that the fireman was engaged in coaling the fire and had but a momentary glimpse of the plaintiff just as the latter was stepping into the zone of danger, and that he immediately gave notice to the engineer.

[5] There is no escape from the conclusion on the testimony in this case, and a verdict to the contrary could not have been sustained, that there was negligence by the plaintiff proximately contributing to his injury.

[6] The situation presented, however, was one in which the evidence can and does uphold a finding by the jury that there was a want of ordinary care in the management by the switching crew of the switching engine in question at the time of the injury which was approximate cause of the accident. If the bell as a matter of fact did not ring, and we surely cannot say under the testimony in this case as a matter of law that it did ring, then a finding by the jury that such failure to ring was a want of ordinary care is a logical and legal conclusion.

[7] There was no violation by defendant of the statutory requirements as to the makeup of the engine crew; no negligence could be predicated on that ground. Momentary failure on the part of either or both the engineer and fireman to have a continuous, constant watch within a reasonable distance on both sides of the track ahead of the train also could not be considered of itself sufficient to warrant a finding of actionable negligence. Shaffer v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 156 Wis. 485, 495, 145 N. W. 1086.

The situation here, however, presents one where such switch engines are constantly moving up and down the tracks upon which or across which other employes are required by their employment to go upon or across. While this engine was proceeding a distance of about 120 feet from the center of the highway where the engine was standing as testified to by defendant's witnesses, at the last time it stopped prior to the accident, or considerably more if it was north of the track as testified to by the plaintiff and his witnesses, the plaintiff was in plain sight carrying the keg of spikes and the maul and approaching at a diagonal which if continued was bound to bring him within the zone of danger and with his head turned in a direction more away than towards the approaching train.

We think therefore that, however negligent he may have been himself in thus approaching the track, it was a proper consideration for the jury as to whether or not the defendant's train crew were also not negligent in failing to watch for and guard against injury to their fellow servants, who in obeying lawful directions of their superior officers might reasonably be anticipated to occupy a position similar to that of plaintiff towards the moving train. N. & W. R. Co. v. Earnest, 229 U. S. 114, 119, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; Southern Ry. Co. v. Smith,

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205 Fed. 360, 123 C. C. A. 488; D. L. & W. R. Co. v. Hughes, 240 Fed. 941, 153 C. C. A. 627; Ry. Co. v. Scanlon, 259 Fed. 137, 141, 170 C. C. A. 205.

Defendant insists that this case must be controlled in its favor by the ruling of the federal court in the case of Aerkfetz v. Humphries, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758.

[8] There the plaintiff, a track repairer, familiar with the manner of work, was injured by the slow movement of an engine pushing two cars against him; he standing with his back to the approaching cars at work without looking or watching for the engine. It was there held that there was no reasonable ground under the evidence to charge the duty on the engineer of expecting that an employe so stationed would pay no attention to his own safety. The court there expressed the opinion that the ringing of bells and sounding of whistles under such circumstances would have simply tended to confusion. That court held that there was no negligence by defendant and that in any event the negligence of the plaintiff himself was such as to defeat his right of recovery. At the time of that decision, negligence of a plaintiff proximately contributing to his injury defeated his right of recovery. Now under the federal statute the contributory negligence of a plaintiff so proximately contributing to his injury, there being also negligence by the defendant also so contributing, has no other effect than to diminish proportionately the amount of plaintiff's recovery. So long as the situation disclosed negligence on the part of both the plaintiff and defendant, each of which contributes in some degree as a proximate cause of the injury, it is a question only of the apportionment of the damages rather than a bar to the plaintiff's right of recovery. Norfolk & W. R. R. Co. v. Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann Cas 1914C, 172; Gr. Tr. Ry. Co. v. Lindsay, 233 U. S. 42, 49, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168; Seaboard A. L. R. Co. v. Tilghman, 237 U. S. 499, 501, 35 Sup. Ct. 653, 59 L. Ed. 1069; Ill. Cent. R. R. Co. v. Skaggs, 240 U. S. 66, 70, 36 Sup. Ct. 249, 60 L. Ed. 528; N. Y. Cent. R. Co. v. Niebel, 214 Fed. 952, 131 C. C. A. 248; Lehigh V. R. Co. v. Scanlon, 259 Fed. 137, 170 C. C. A. 205; Ewig v. C., M. & St. P. R. Co., 167 Wis. 597, 606, 167 N. W. 442, 169 N. W. 429.

We cannot consider that the facts here as to defendant's negligence are so parallel with those in the Aerkfetz Case, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, supra, as to make that decision controlling here on either question involved.

[9] That the plaintiff himself was negligent is beyond question; but negligence by defendant having been found, the plaintiff's negligence cannot be deemed the sole proximate cause. U. P. R. R. Co. v. Hadley, 246 U. S. 330, 333, 38 Sup. Ct. 318, 62 L. Ed. 751.

This view of the situation disposes adversely to defendant of its main contentions on this appeal.

[10] The failure to submit the question of assumption of risk was not error. The negligence of the defendant was that of a fellow servant of plaintiff. As to such negligence there is under the federal law no assumption of risk by a coemploye until at least actual knowledge of such particular negligence is brought to his attention or it is so obvious that the ordinarily prudent person would observe it. Erie R. R. Co. v. Purucker, 244 U. S. 320, 324, 37 Sup. Ct. 629, 61 L. Ed. 1166; Chesapeake & O. R. R. Co. v. De Alty, 241 U. S. 310, 315, 36 Sup. Ct. 564, 60 L. Ed. 1016; Chesa. & O. R. R. Co. v. Proffitt, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102; Lehigh Val. R. Co. v. Scanlon, 259 Fed. 137, 142, 170 C. C.

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A. 205; Kansas City So. R. Co. v. Martin (C. C. A.) 262 Fed, 241, 244; Reul v. Wis. N. Ry. Co., 166 Wis. 128, 134, 163 N. W. 189; Ewig v. C. M. & St P. Ry. Co., 167 Wis. 597, 606, 167 N. W. 442, 169 N. W. 429.

[11] Submission of questions 7 and 8 of the special verdict quoted in the statement of facts were all unnecessary elements under the issues requisite to determine the respective rights and liabilities of the parties and, if error at all, was not such as would warrant a reversal of the judgment.

Judgment affirmed.

Winslow, C. J., and Kerwin, J., took no part.

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PHILADELPHIA & R. RY. CO. v. HANCOCK.
(No. 415.)

(United States Supreme Court. Argued March 2, 1920. Decided June 1, 1920.)

40 Supreme Court Reporter, 512.

1. MASTER AND SERVANT—COMPENSATION FOR INJURY IN INTERSTATE COMMERCE IMPROPER.

A judgment affirming an award under the Pennsylvania Workmen's Compensation Act, for the death of a railroad trainman must be reversed, if decedent was employed in commerce between the states when the accident occurred.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

2. COMMERCE—TRAINMAN EMPLOYED IN "INTERSTATE COMMERCE," IF ANY CAR CONTAINED INTERSTATE FREIGHT.

Under Employers' Liability Act (Comp. St. §§ 8657-8665), a railway trainman was employed in "interstate commerce," if any of the cars in his train contained interstate freight.

(For other cases, see Commerce, Dec. Dig. § 27[6].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

3. COMMERCE—RAILWAY TRAINMAN ENGAGED IN INTERSTATE COMMERCE, THOUGH CARS NOT BILLED WHEN HANDLED BY HIM.

A railway trainman, belonging to a crew operating a train of loaded cars from a colliery to yards 2 miles away, was engaged in interstate commerce, where the ultimate destination of some of the cars was outside the state, as appeared from the instruction cards or memoranda delivered to the conductor by the shipping clerk at the mine, and freight charges were paid for the entire distance, beginning at the mine, though the cars were not weighed and billed to the consignee until another crew moved them from such yard to scales some 10 miles away, where they were inspected, weighed, and billed.

(For other cases, see Commerce, Dec. Dig. § 27[6].)

Mr. Justice Clarke dissenting.

On Writ of Error and Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

Proceedings under the Workmen's Compensation Act of Pennsylvania by Margaret L. Hancock for compensation for the death of her husband, opposed by the Philadelphia & Reading Railway Company, employer. Compensation was awarded, and the award affirmed by the Supreme Court of Pennsylvania (264 Pa. 220, 107 Atl. 735), and the employer brings error and certiorari. Writ of petition dismissed, judgment reversed, and cause remanded.

See, also, 250, U. S. 65, 40 S. Ct. 54, 64 L. Ed. —.

Messrs. George Gowen Parry and Charles Heebner, both of Philadelphia, Pa., for plaintiff in error.

Mr. Hannis Taylor, of Washington, D. C., for defendant in error.

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MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The judgment below affirmed an award for respondent under the Workmen's Compensation Act of Pennsylvania (Act June 2, 1915 [P. L. 736]), granted because of the death of her husband from an accident while in the petitioner's employ as a trainman.

After a writ of error had been sued out we allowed a writ of certiorari. 250 U. S. 658, 40 Sup. Ct. 54, 64 L. Ed. ——. The former must be dismissed; the case is properly here upon the latter.

[1, 2] If, when the accident occurred, the husband was employed in commerce between states, the challenged judgment must be reversed, and he was so employed if any of the cars in his train contained interstate freight. Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665); St. L., S. F. & Tex. Ry. v. Seale, 229 U. S. 156, 161, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; New York Central & Hudson River R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; New York Central R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; New York Central R. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536; Southern Pacific Co. v. Industrial Accident Commission (January 5, 1920) 251 U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. ——.

[3] The essential facts are not in controversy; the nature of the employment, therefore, is a question of law.

The duties of the deceased never took him out of Pennsylvania; they related solely to transporting coal from the mines. When injured he belonged to a crew operating a train of loaded cars from Locust Gap colliery to Locust Summit yard, two miles away. The ultimate destination of some of these cars was outside of Pennsylvania. This appeared from instruction cards or memoranda delivered to the conductor by the shipping clerk at the mine. Each of these referred to a particular car by number and contained certain code letters indicating that such car with its load would move beyond the state.

Pursuing the ordinary course these cars were hauled to Locust Summit yard and placed upon appropriate tracks; there the duties of the first crew in respect of them terminated. Later, having gathered them into a train, another crew moved them some 10 miles to Shamokin scales, where they were inspected, weighed, and billed to specifically designated consignees in another state. In due time they passed to their final destinations over proper lines. Freight charges at through rates were assessed and paid for the entire distance beginning at the mine.

Respondent maintains that the coal in cars ticketed for transportation as above described did not become part of interstate commerce until such cars reached Shamokin scales and were there weighed and billed. But we think former opinions of this court require the contrary conclusion. The coal was in the course of transportation to another state when the cars left the mine. There was no interruption of the movement; it always continued towards points as originally intended. The determining circumstance is that the shipment was but a step in the transportation of the coal to real and ultimate destinations in another state. Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 108, 32 Sup. Ct. 653, 56 L. Ed. 1004; Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 124, 126, 33 Sup. Ct. 229, 57 L. Ed. 442; Railroad Commission of Louisiana v. Texas & Pacific R. R. Co., 229 U. S. 336, 341, 33 Sup. Ct. 837, 57 L. Ed. 1215; Baer Brothers Mercantile Co. v. Denver & Rio Grande R. R. Co., 233 U. S. 479, 34 Sup. Ct. 641, 58 L. Ed. 1055.

The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Clarke, dissents.

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INSPIRATION CONSOL. COPPER CO. v. CONWELL. (No. 1757.)

(Supreme Court of Arizona. June 3, 1920.)

190 Pacific Reporter, 88.

1. MASTER AND SERVANT—COMPENSATION ACT DOES NOT PRECLUDE RECOVERY IN ACTION FOR DEATH OF SERVANT CAUSED BY NEGLIGENCE.

The Compensation Act does not preclude recovery by representatives of the deceased employee for wrongful death under Lord Campbell's Act, Civ. Code 1913, par. 3372, though the Compensation Act was applicable to the employment.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Appeal from Superior Court, Gila County; G. W. Shute, Judge.

Action by Emily Conwell, as administratrix of the Estate of Lawrence Conwell, deceased, against the Inspiration Consolidated Copper Company. Judgment for plaintiff and new trial denied, and defendant appeals. Judgment and order affirmed.

This is an action for damages for the death of Lawrence Conwell, alleged to have been caused by the negligence of the defendant. The plaintiff is the administratrix of Conwell's estate. Conwell was a motorman in the service of the defendant, and was killed by the derailment of a train of ore cars. The plaintiff claimed damages in the sum of $25,000. The defendant interposed a general demurrer to the complaint, and pleaded both in abatement and in bar that the employment of Conwell was under the "Compensation Act," and that in consequence the "Compensation Act" furnished the exclusive measure of the liability of the defendant. The court overruled the demurrer, and on motion of the plaintiff struck out both pleas. The action was tried on the complaint and the answer thereto, in which the defendant pleaded negligence on the part of the deceased Conwell, assumption of risk, and a general denial. The jury returned a verdict for plaintiff in the sum of $17,000. A motion for a new trial was made and overruled by operation of law. The defendant appeals, and assigns numerous errors.

E. W. Rice, of Globe, for appellant.

Norman J. Johnson, and H. M. Foster, both of Globe, for appellee.

BAKER, J. (after stating the facts as above). [1, 2] The defendant's assignments of error Nos. 1, 2, 3, and 10, are based upon the action of the court in overruling the general demurrer to the complaint, striking out pleas in abatement and in bar of the action, and the denial of the defendant's request for an instructed verdict. These matters were all predicated upon the proposition that the Compensation Act (chapter 7, title 14, Rev. Stat. 1913) was applicable, and governed the employment of the deceased Conwell, and that it measured the liability of the defendant and precluded plaintiff from instituting or maintaining the present action. The exact question was presented for decision, and has been considered and decided in this state adversely to the defendant's contention in Behringer, Adm'x, etc., v. Inspiration Consolidated Copper Co., 17 Ariz. 232, 149 Pac. 1065. We are pressed in a very elaborate argument to reconsider and overruled this decision. The case construes the statute touching the right of a personal representative to sue for wrongful death, and holds that the "Compensation Act" does not restrict or limit the right of a personal representative to resort to Lord Campbell's Act (para-

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graph 3372, Rev. Statutes 1913). It was decided July 7, 1915, and has been accepted and acted upon as correct ever since. The argument fails to convince us that the opinion violates any principle of law, or works any injustice and we must consider the question as at rest. When a rule has once been deliberately adopted and declared, it ought not to be disturbed except for very urgent reasons, and upon a clear manifestation of error. We adhere to the ruling in the Behringer Case.

Assignments Nos. 8, 9, 10, 13a, 13b, 13c, 13e, 13f, 13g, 14, and 15 raise the contention that the verdict and judgment are not sustained by the evidence: First, because there is no proof of proximate cause; and, second, because it is clear that the deceased, Conwell, assumed the risks. The undisputed facts of the case are that the deceased was engaged at work for the defendant, driving a motor to which was attached 15 cars loaded with ore on the 400-foot level in the defendant's mine. Conwell, when driving the motor, rode on the right-hand side near the rear. While upon a curve, and going at a speed of four of five miles an hour, two of the cars immediately in the rear of the motor jumped the track on the right-hand side, one of the cars striking and scraping the timber standing on the side of the track for a distance of about ten feet. The motor remained on the track. One or two jolts or jars of the cars occurred, one being so violent that Conwell's helper, who was riding on the motor in front, was compelled to hold onto a rod very tightly so as not to lose his seat. When the cars stopped, Conwell was found behind the motorman's seat between the motor and the first car, holding onto the seat. His leg had been dragged along the right-hand side of the track; one of the witnesses put his arms around Conwell to assist him, and found that he was crushed; he was bleeding at the mouth, and died in about ten minutes. No one actually saw just how the accident occurred.

[3] It is argued that in the absence of direct evidence it was mere guess or speculation as to how Conwell came to his death, and for that reason the plaintiff could not recover. It is suggested that Conwell might have been standing up and accidentally overbalanced, or that a chain might have dropped off the pan on the motor, and he might have reached from his seat to the other side between the safety post and the projecting rib on the first car to rescue this chain when it was engaged by the wheel of the car, and the car was thereby derailed, pinning him between the car and the safety post, and that if his death thus occurred the liability of the defendant would not be involved. We are not at all impressed with this argument. Conceding, as we do, that it was not for the jury to guess or speculate as to the cause of the accident, we think it is far more reasonable to suppose, and the jury, in our opinion, might well have inferred, that the jolt of the derailment caused Conwell to lose his seat and fall between the car and the motor, or between the safety post and the car, and that he was thus crushed and killed. The jolt was so violent as to compel Conwell's helper to hold on very tightly to avoid losing his seat, and it seems reasonable to infer that the same jolt, unseated Conwell. In our opinion, the evidence was sufficient to send the case to the jury upon this point, and we think that the jury was warranted in finding, as they must necessarily have done, that Conwell was killed by the derailment of the cars without any intervening cause such as suggested by the defendant.

[4-6] The material question is, What was the proximate cause of the accident? It must be conceded that unless the bad condition of the track as alleged in the complaint was the efficient and dominant cause of the derailment of the cars, the plaintiff had no case. That cause is proximate without which the accident would not have happened. Railroad Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. Proximate cause is a question of fact, and a question for the jury if there is substantial evidence from

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which it may reasonably be deduced that the negligence shown was the proximate cause of the injury complained of. In short, proximate cause may be determined from circumstantial evidence. Railroad Co. v. Kellogg, supra; Weleetka Cotton Oil Co. v. Brookshire (Okl.) 166 Pac. 408; Missouri, K. & T. Ry. Co. v. Minor, 75 Okl. 10, 181 Pac. 142. The evidence with reference to the condition of the track at the place of derailment tends to show that it was in a flagrantly defective condition. Two accidents had occurred at the same place prior to the one in question. The ground was muddy, soft, and yielding under the track. The rails would go up and down when the motor was passing; the water being forced from under the ties. The rail on the right-hand side of the curve of the track was lower than on the left, and when the motor was passing, it would swing two ways; one movement went up and one went side-ways, giving a lurch and jerk. There was also evidence that there was a joint in the rail at the sofest place in the track where the accident occurred, and that at that point the track gave way more than at other points. It is not considered necessary to enter into a lengthy discussion for the purpose of showing that the evidence of the bad condition of the track was sufficient to carry the case to the jury upon the point that the derailment would not have occurred had it not been for this bad condition. The inference seems irresistible that such was the case.

[7] It is true that the evidence tending to show that the defendant was negligent in permitting the bad condition of the track to exist was strongly contradicted by the witnesses for the defendant. But it is not denied that there was a very material conflict in the testimony upon that point. Thus, the question whether the defendant's negligence was the proximate cause of the disaster became a question for the jury. We will not disturb a verdict where the evidence is conflicting.

[8] As to the assumption of risk, it must be admitted that the uncontradicted evidence proves that Conwell, for some time prior to the accident, had actual and positive knowledge of the bad condition of the track, and understood and appreciated the danger arising from running the ore cars over it. Were it not for article 18, section 5, of the state Constitution, which provides that "the defense of contributory negligence or of assumption of risk shall in all cases whatsoever be a questiin of fact, and shall, at all times, be left to the jury," it would have been the duty of the trial court to have granted the defendant a new trial on the ground that the verdict was contrary to the evidence on the question of the assumption of risk. We are therefore called upon to determine for the first time in this jurisdiction, the scope and effect of the constitutional provision. The language of the provision is plain and unambiguous, and to our minds clearly indicates that the power or duty to finally and conclusively settle the question of contributory negligence or assumption of risk is, by its terms, transferred from the court to the jury. If this is not the force and effect of the provision, we can conceive of no reason why the framers of the Constitution should have adopted the measure. We think that the evident purpose and intent of the provision is to make the jury the sole arbiter of the existence or nonexistence of contributory negligence or assumption of risk in all actions for personal injuries. The same question arose in the case of Eva Roberts Cole, Administratrix of the Estate of A. W. Roberts, Deceased, et al. v. Jacob M. Dickinson, Receiver of the Chicago, Rock Island & Pacific Ry. Co. (Dickinson v. Cole [Okl.] 177 Pac. 570), and the Supreme Court of Oklahoma, construing the section of the Constitution of that state, which is exactly like ours, held in effect, that the verdict of the jury on the question of contributory negligence or assumption of risk was conclusively upon the court. The syllabus of the case as prepared by the court is as follows:

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"Article 23, § 6, of the Constitution of Oklahoma is not merely declaratory of the common law, but requires that the defense of contributory negligence and assumption of risk as to questions of fact in all cases whatsoever shall at all times be left to the jury, and the finding of the jury upon these defenses is conclusive upon the court."

The case was carried to the United States Supreme Court on writ of error (Chicago, R. I. & P. R. Co. v. Eva Roberts Cole, etc., reported in 251 U. S. 54, 40 Sup. Ct. 68, 64 L. Ed.—), and was there affirmed. Mr. Justice Holmes, speaking for the court, said:

"As it [state] may confer legislative and judicial powers upon a commission not known to the common law (Prentis v. Atlanta Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150), it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the states, and the controversy with regard to their powers in matters of law more generally as illustrated in Sparf v. United States, 156 U. S. 51, 715, 15 Sup. Ct. 273, 30 L. Ed. 343, 10 Am. Crim. Rep. 168, and Georgia v. Brailsford, 3 Dall. 1, 4, 1 L. Ed. 483, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed."

Since the verdict of the jury upon the question of assumption of risk was conclusive upon the court, it was not error to deny the defendant's motion for a new trial.

[9] Assignment 13a is directed at the amount of the verdict as be-excessive and unreasonable, and that it was rendered under the influence of passion and prejudice. The verdict was for $17,000. We have discovered nothing in the record tending to disclose anything which happened during the trial from which it can be inferred that the jury might have been influenced by passion or prejudice in arriving at their verdict. The deceased, Conwell, was a married man, the father of two minor children, and at the time of his death was 32 years old. His life expectancy, as proven by the American Experience Tables of Mortality, was $33^{80}/_{100}$ years. He was in robust health; industrious and attentive to business; he had specialized in glass making as a stencil cutter or pattern maker for the molding of glass, making figures on glass, etc., and had a proposition in view at the time of his death wherein he would go into business for himself in sand glass, cutting stencils or patterns, whereby he would probably make more than he would as a mere wage-earner. He owned his own home, and at the time of his death had saved about $400 out of his wages. The evidence showed that he was saving and laying aside a considerable portion of his wages every month. As a motorman he was earning at the time of his death, approximately $165 per month. If the deceased had lived for the full period of his expectancy, and had continued to earn $165 monthly, as at the time of his death, he would have been approximately 65 years old, and would have earned approximately $65,000. In view of these facts we do not think it can be said that the verdict was excessive. As a general rule, the amount of damages recoverable in an action for death by wrongful act is a matter pecuiliarly within the province of the jury, and their finding will not be set aside as excessive, unless it is the result of passion or prejudice. De Amado v. Friedman, 11 Ariz. 56, 89 Pac. 588; Southern Pac. Co. v. Wilson, 10 Ariz. 162, 85 Pac. 401.

In McGrory v. Pac. Elec. R. Co., 22 Cal. App. 671, 136 Pac. 303, it is said:

"In order to warrant a court in setting aside a verdict for damages on the ground that too great a sum of money has been awarded, the sum must be so disproportionate to the result of any reasonable computation,

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based on the facts shown in evidence, as to suggest at once that the jury must have been influenced by some factor, improper for hm to consider, such as their sympathy for the plaintiff or their bias or prejudice against the defendant."

We have discussed substantially all the points raised by the defendant which we deem vital, or requiring extended discussion. Other assignments relate to the introduction of certain testimony over the objection of the defendant, and submitting certain instructions to the jury. We have considered these assignments, but, in our opinion, they present no sufficient reason for reversing the judgment of the lower court. The judgment and order appealed from should be affirmed; and it is so ordered.

Cunningham, C. J., and Ross, J.

MASSACHUSETTS BONDING & INS. CO. v. LOS ANGELES R. CORPORATION. (L. A. 5324.)

(Supreme Court of California. May 19, 1920. Rehearing Denied June 17, 1920.)

190 Pacific Reporter, 161.

1. MASTER AND SERVANT — CHARGE ALLOWING SUBROGATED COMPENSATION INSURER TO RECOVER DAMAGES TO SONS OF DECEASED EMPLOYEE HELD ERRONEOUS AS NOT SUPPORTED BY PLEADING AND EVIDENCE.

In an action by an insurance company, which became subrogated to the rights of the widow and heirs to recover against a stranger for the death of an employee by paying compensation to her, where the only damage pleaded and supported by the evidence was the damage to the widow, an instruction, authorizing recovery of damage to the two sons of deceased as well as to the widow, was erroneous.

(For other cases, see Master and Servant, Dec. Dig. § 410.)

2. MASTER AND SERVANT — INSURER PAYING COMPENSATION TO EMPLOYEE'S WIDOW HELD SUBROGATED TO RIGHTS OF SONS ALSO.

Where a deceased employee left a widow and two sons, but only the widow claimed compensation and received payment from the insurer, the insurer nevertheless was subrogated to the right to recover damages to the sons as well as to the widow.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

3. MASTER AND SERVANT—ADMISSION BY COUNSEL HELD NOT TO JUSTIFY CHARGE AUTHORIZING SUBROGATED INSURANCE CARRIER TO RECOVER DAMAGES NOT PLEADED.

An admission by defendant's counsel that the right of the widow and heirs to recover for the death of deceased vested in the insurer who paid the compensation does not warrant a charge authorizing the insurer to recover damages to the sons of deceased, where it pleaded and proved only damage to the widow.

(For other cases, see Master and Servant, Dec. Dig. § 410.)

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Department 1.

Appeal from Superior Court, Los Angeles County, Curtis D. Wilbur, Judge.

Action by the Massachusetts Bonding & Insurance Company against the Los Angeles Railroad Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

E. B. Drake and Kemp, Mitchell & Silberberg, all of Los Angeles, for respondent.

OLNEY, J. This is an appeal from a judgment for plaintiff in an action for damages sustained by the death of one, Ogan, through the alleged negligence of the defendant. At the time of his death Ogan was employed by a corporation known as Bowles Bros Company, and in the course of his employment was driving a wagon westerly on Pico street in Los Angeles. The defendant operates a two-track electric street railroad on the street, the tracks occupying the middle of the street. Ogan was on the northerly or right-hand side of the street as he was going, and off the tracks. On approaching the intersection of South Union street he turned to the left or south across the tracks as if to turn into South Union street. He was driving slowly, and apparently turned without any signal of his intention and without looking back. His wagon was struck by one of the defendant's cars coming up behind him; he was thrown from the wagon and sustained injuries from which he died. He left a widow and two adult sons. His widow made claim against his employer under the Industrial Compensation Act (St. 1913, p. 279), and the claim was allowed, and was paid by the plaintiff as the insurance carrier for the employer. The plaintiff then brought the present action as subrogated by the Industrial Compensation Act to any right of action against the defendant for Ogan's death.

There seems to be little doubt but that Ogan was guilty of contributory negligence in turning as he did across the defendant's tracks without signal and without looking back. Counsel for the plaintiff do not contend to the contrary. The case was tried for the plaintiff in the lower court chiefly upon the theory that after Ogan had turned and had placed himself in a position of peril, his peril was observed and realized by the motorman of the approaching car in time for him, acting with reasonable promptness under the circumstances, to stop the car and avoid the accident, and he did not do so. It is upon this theory alone that it is sought here to justify the verdict for the plaintiff. If the evidence be sufficient to sustain the verdict upon this ground it is at best but little more than sufficient for that purpose. It is not a case of which it can be said that a verdict for the plaintiff is certainly a just one or that a new trial would reasonably result in another such verdict. In other words it is not a case where it can be said with any certainty that substantial justice has been done and that the result should therefore not be disturbed because of errors which may have occurred in reaching it. There was one substantial error which did occur and which under these circumstances requires a reversal and new trial.

The plaintiff's complaint alleged the fact of Ogan's death through the negligence of the defendant; that he left a widow and two sons of whom the widow was dependent on him for support; that the plaintiff by reason of its payment of the claim of the widow against Ogan's employer had been subrogated to any right of action for his death, and then, as the only allegation of damages suffered, alleged that by reason of Ogan's death, his widow had been damaged in the sum of $10,000.

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There was no allegation of damage to the sons nor of facts from which such damage might be inferred. The complaint, also, in alleging the right in the plaintiff by way of subrogation to maintain the action alleged it to be to maintain an action for all damages suffered by the widow without mention of any damages to the sons. At the trial no evidence was introduced of any relation between Ogan and his adult sons who were not living with him, which showed any pecuniary damage on their part.

[1] In this condition of the pleadings and the evidence the jury were charged that the action was one prosecuted by the plaintiff to recover damages alleged to have been sustained by the widow and sons of Ogan; that the right of the widow and heirs to recover for his death had vested in the plaintiff; that if the jury found for the plaintiff the measure of the recovery which should be allowed was the amount of damages suffered by the heirs; that the jury in fixing damages might consider the relation of the widow and children to their deceased husband and father; and that the fact that the widow and children had been and would be deprived of the comfort, society, and protection of the defendant might be considered in arriving at the pecuniary value of the life of Ogan to his widow and children.

In other words, while the complaint alleged and the evidence showed only damage to the widow, the case was unequivocally submitted to the jury as one wherein their verdict, if they found for the plaintiff, should be for the amount of damages suffered by the adult sons, as well as by the widow. The error in so instructing the jury is manifest.

[2] In this connection it may be well to note a claim made by the defendant. It is that since only the widow made claim against Ogan's employer and was alone paid by the plaintiff, the plaintiff's right by way of subrogation was limited to a recovery of the damages suffered by her alone. This is not correct. The making of a lawful claim for compensation under the Industrial Compensation Act works a subrogation of any right of action to recover for his death, whether the person making the claim be the exclusive beneficiary for whom such action would lie or not. Western States, etc., Co. v. Bayside Lumber Co., 187 Pac. 735. The plaintiff, therefore, was entitled to maintain an action for any damages suffered by the sons, as well as by the widow. But the point is that it did not bring such an action. The action it brought was only for damages suffered by the widow. The jury, nevertheless, were instructed that the action was one for damages suffered by the sons, as well as by the widow, and that if they found for the plaintiff they should determine the amount of the verdict accordingly.

[3] The only answer made by plaintiff's counsel to the defendant's claim of error in the respect under discussion is: First, that it appears that the trial court in charging the jury stated, "It is admitted by counsel that for the purpose of this litigation the right of the widow and heirs to recover for the death of the deceased husband and father have vested by operation of law in the plaintiff corporation"; and, second, that attention was not called to the point in argument on motion for a new trial when, in fairness, it should have been. It is argued that, in view of the statement in the charge as to admission by counsel, it must be presumed that such admission was made, even though there be, as there is, nothing in the record showing such admission. We need not decide whether such statement in a charge to the jury proves itself, so to speak, without anything in the record to substantiate it, for, assuming that an admission was made as stated, it was plainly no more than an admission of the subrogation worked by law. It was not an admission that the plaintiff was entitled to recover for damages suffered by the sons, as well as by the widow. The language quoted itself shows that it was

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not this question, but the matter of subrogation which was in the mind of the court as that which was admitted, and a reading of the balance of the instruction confirms this view.

[4] As to the second contention of plaintiff's counsel, that attention was not called to the point in the argument on motion for a new trial when, in fairness, it should have been, suffice it to say, both that this fact does not appear from the record, but only from counsel's statement, and also that it cannot be said that the right to complain of an error appearing on the record is lost by a failure to call specific attention to it in presenting a motion for a new trial.

Judgment reversed.

We concur: Shaw, J.; Lawlor, J.

WESTERN INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION ET AL. (S. F. 8796.)

(Supreme Court of California. May 12, 1920.)

109 Pacific Reporter, 27.

2. MASTER AND SERVANT—FINDING OF FACTS IN COMPENSATION CASE CONCLUSIVE.

Findings of the Industrial Accident Commission under Workmen's Compensation Act upon questions of fact are conclusive, where there is any substantial evidence to support the award.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — EVIDENCE INSUFFICIENT TO SHOW CONTRACT OF INSURANCE PRIOR TO ACCIDENT.

Evidence of employer in a proceeding under Workmen's Compensation Act as to acceptance of counter offer of the indemnity company on receiving employer's application stating a certain minimum premium *held* not sufficiently definite upon which to base a finding that the employer accepted the counter offer prior to the accident.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

5. MASTER AND SERVANT — FINDING OF AUTHORITY OF AGENT TO BIND INDEMNITY COMPANY BY PAROL HELD NOT SUSTAINED BY EVIDENCE.

In a compensation proceeding involving liability of an indemnity company to an employer of an injured servant, evidence *held* insufficient to support a finding that a local agent of the indemnity company had authority to bind the company by parol from application.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

6. MASTER AND SERVANT—FINDING OF CUSTOM THAT ASSURED WAS COVERED FROM DATE OF APPLICATION NOT SUSTAINED BY EVIDENCE.

In a proceeding under Workmen's Compensation Act, a finding that it was the custom and the practice that an employer was covered by insurance from the date of his application, where the terms of the application

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were not unconditionally accepted by the company, *held* not supported by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Wilbur, J., dissenting.

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding by Ethel Lamb, under the Workmen's Compensation Act, to obtain compensation for the death of her husband, John Lamb, opposed by M. B. Pond, the employer, and the Western Indemnity Company. There was an award of compensation, and the Indemnity Company brings certiorari. Award annulled.

E. F. Conlin, of San Francisco, for petitioner.

Clarence N. Riggins, of Napa, appearing specially and not otherwise, for respondent Ethel Lamb.

Christopher M. Bradley and A. E. Graupner, both of San Francisco, for respondents.

LAWLOR, J. This is a writ of review issued upon the application of petitioner, the Western Indemnitty Company, a corporation. The Industrial Accident Commission, on April 23, 1918, made an award in the sum of $2,596.14 against the petitioner and in favor of Ethel Lamb, for the accidental death of her husband, John Lamb, an employee of Dr. Pond, of Napa county, it having been found by the commission that petitioner was the insurance carrier of Dr. Pond at the time of the injury. It appears that Dr. Pond had been engaged in operating a small farm and fruit orchard some 10 or 12 miles from the city of Napa. John Lamb was employed on the place as a man of all work, and, although that kind of occupation does not fall within the Workmen's Compensation Act, both Dr. Pond and Lamb nevertheles elected to come under its provisions.

On October 2, 1917, Lamb took a team of horses used on the place to a blacksmith shop in the city of Napa to be shod. About noon, as he was taking the horses out of the shop, they became unmanageable and trampled upon him, inflicting injuries from which he died on October 6.

The principal contention of petitioner is that it was not the insurance carrier of Dr. Pond when the accident occurred, and in this connection petitioner makes the claim that the following findings of the commission are without support in the evidence:

"(6) That prior to the said 2d day of October, 1917, and on or about the 24th day of September, 1917, the defendant M. B. Pond had applied to Arthur H. Smith of Napa, the duly accredited and authorized agent of the defendant Western Indemnity Company, for a renewal of a then expiring policy of insurance covering his liability for injury to his employees, and had requested said agent to procure for him such policy, to take effect upon the expiration of his then existing policy, which would expire on September 25, 1917. That at that time it was the custom and the practice that an assured was covered by the insurance subsequently provided in the policy, from the date of his application. That after the application by said defendant Pond, and before the said 2d day of October, 1917, said defendant Pond was notified by said agent Smith that the premium or rate of said insurance had increased, the exact amount of such increase being at that time not known to said agent. That thereupon said defendant Pond stated his willingness and consent to pay the increased rate, and again requested that the policy be issued. That thereafter, and on or about the 10th day of October,

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1917, the general agents of said Western Indemnity Company duly issued their policy of insurance dated the 25th day of September, 1917, to the said defendant Pond, insuring him against his liability for injuries to his employees, and that on the 10th day of October, 1917, said defendant duly paid to said agent Smith the full premium for said insurance, which premium was duly received and accepted by said agent. (7) That by reason of the facts as set forth in paragraph 6 hereof, the defendant Western Indemnity Company was the insurance carrier of said defendant employer at the time of said injury, and had insured said employer against liability for full compensation for said injury, and said employer is entitled to be relieved from such liability under the provisions of subdivision (e) (2) of section 30 of the Workmen's Compensation, Insurance and Safety Act of 1917."

The evidence will sufficiently appear in the discussion.

Arthur H. Smith, doing business under the name of "Arthur H. Smith & Co.' 'in the city of Napa, was engaged in placing insurance for various companies, including the Western Indemnity Company. Upon the filing by petitioner with the state insurance commissioner of "a duplicate power of attorney" on July 1, 1917, a license was issued to Smith for the term of one year in compliance with the provisions of section 633 of the Political Code. The license gave Smith authority "to solicit applications for insurance or surety bonds or to effect insurance or surety bonds in the name of said company." This power of attorney was not introduced in evidence, but we shall assume that it corresponded with the license.

In September, 1916, Smith secured for Dr. Pond a policy of compensation insurance in "the Massachusetts Company." That policy expired on September 25, 1917. On September 24, 1917, Dr. Pond went to the office of Smith, and "verbally" requested that such policy be "renewed." There is a dispute in the testimony of Dr. Pond and Smith as to whether on this occasion Dr. Pond saw Smith personally or dealt with an employee in Smith's office Dr. Pond testified that—

"Some time in September, I think after the 15th, I received a letter from Mr. Smith stating that my policy terminated * * * asking me * * ' if I wanted a renewal. I gave the letter to Mr. Smith when I went, and ordered a renewal of insurance. I left it as a reminder. * * * He says, 'The premium will be raised.' I was informed that the last premium would be $10 for farmers, and it would be probably $15. * * * Any discussion we had was simply his statement to me that it would be probably not less than $15, and I told him to go ahead. I wanted to be insured even if it was more. He told me right on the start it would probably be that much, 'possibly more,' is the way he put it.'

Smith was asked:

"At the time you took that application from Dr. Pond, was there any question about the issuance of a policy on acconut of the premium—minimum premium "

And he anwered:

"You will have to ask the young lady in the office. She did that work that day. I was not in. * * *"

Smith also testified that the general agent had informed him in a letter of June 29, 1917, that the premium rate for compensation insurance would be $10 "at least temporarily," and that—

"The first notice I had that the minimum premium on farm labor policies had been raised by petitioner was when this application was referred to in this case as being $15."

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Smith stated further that, as the Massachusetts Company had discontinued writing compensation insurance, on September 24 he forwarded to the general agent a written application for coverage for Dr. Pond to begin on September 25, 1917, the application being signed by Smith alone, and in item 14 thereof, opposite the printed words "the minimum premium for this policy," appearing the figures "$10.00." This application was received on September 25 in the office of the general agent, Arthur G. Nason, who conducted the agency as "Arthur G. Nason & Co." In due course Smith received an answer to the application under date of September 26 to the effect that the minimum premium on farm labor policies was $15, and stating:

"We shall hold the application pending receipt of your advices as to whether or not we may write at this rate."

On September 29 Smith wrote to Dr. Pond:

"We are in receipt of a letter from the company stating that the least they can write a compensation policy on farm labor is $15 minimum premium. Kindly advise us by return mail if this is satisfactory to you."

There is a further lack of agreement in the testimony of Dr. Pond and Smith as to what occurred after September 24. Smith testified as follows:

"Q. Did you not see him between September 24 and October 2? A. Me? No. * * * Q. Do you know whether he came to your office during that interval? A. I couldn't say. Q. Was it reported to you that he had been in there? A. No. I don't recall it if it was. * * * Q. Then he didn't answer your letter of September 29 until after the accident on October 2 A. That is right. * * * Q. Did you see him on the afternoon of October 2? A. I did. * * * In my office. * * * He said it would be all right at the $15 premium. * * * Q. When Dr Pond did call on you on October 2 did you then know that this accident had occurred. A. I did."

Dr. Pond's testimony is less definite as to when, after September 24, he talked with Smith about the matter:

"Q. And did you return afterwards to Mr. Smith's office for your insurance policy, * * * and on what date? A. I can't say as to the first time—the date—but I went and had a talk with Mr. Smith, and he said it was all right. * * * Q. When did you go back to Mr. Smith after requesting that he have the policy renewed? Was it before or after October 2d A. Well, my memory is this: that I had another talk with Mr. Smith after ordering a renewal, when he told me that it would be at least $15. 'Well, it might be more,' he said. 'Well,' I said, 'I will draw you a check for $15, it doesn't make any difference. If it is more, I will give you more, and if it is less you can refund it.' He said, 'It would not be less.' On October 2d I called again on Mr. Smith and again tendered money which he refused because he did not know exactly what it would be. He had written me a letter, and I think it was dated the 29th of September, that it would be $15. Whether I called between the 29th and the 2d day of October, the date of the accident, I don't remember positively. Q. But on October 2d, was it after the accident that you called at Mr. Smith's office? A. It was. * * * Q. When did you receive that letter, Doctor? A. I can't tell you exactly. I don't know. Q. But after you received that letter, you called on Mr. Smith, did you not? A. Yes, sir. Q. And that was after the accident had occurred? A. I think I called on Mr. Smith before. I am not positive. I called immediately on receiving the letter. * * * Q. Did you get it before or after the accident. A. I am not positive. I went immediately when I did receive it to Mr. Smith, but I can't say

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positively whether it was before the accident or after. Q. Then, immediately upon receiving the letter—you received it before the accident—you went to Mr. Smith? A. Yes, sir. My impression is that I did. Q. Did what? A. That I did go to Mr. Smith before the accident to tell him it was all right, verbally. My impression is that, but I wouldn't say positively. * * * Q. You are not sure before the accident or after? A. I am not sure. * * * I think so, but I am not positive. Q. You have testified very clearly that you went to Mr. Smith's office after the accident on October 2? A. Yes. Q. But it is not clear in your mind whether you had the conversation at that time with Mr. Smith about the minimum premium of $15 or not A. No, I am not, but mind you, before that Mr. Smith had told me that would probably be $15 and probably more—before that time."

On the afternoon of October 2, after Dr. Pond had called on Smith and they were both aware of the injury to Lamb, Smith wrote the following letter to the general agent:

"In anwer to your favor of the 26th of September in regard to application of Milo B. Pond, would ask that you kindly issue policy at the $15.00 minimum."

No mention of the accident was made in this letter. On October 3 Smith wrote again to the general agent:

We herewith inclose you report of accident to John Lamb, employed by Dr. M. B. Pond. Kindly give this your attention."

Before the receipt of this letter, and in response to that of October 2, the office of the general agent issued a policy at the $15 rate and dated it October 3. This was received by Smith on October 4. On October 5 he sent the following letter to the general agent:

"We herewith return you policy No. CC-14425, Milo B. Pond, as you have made an error in dating same. Under date of September 24, 1917, we sent you application asking you to issue the policy, and under date of September 26th you wrote us advising us of the increase in the minimum charge and also stating that you would hold the application pending receipt of our advice. Kindly issue this policy from date of application."

No written reply was made to this letter, but Smith testified that the date of the policy was changed from October 3 to September 25, while he was in the office of the general agent on October 8 or 9. From the testimony that follows it would appear that the actual date of this meeting and the alteration of the policy was October 9. A report of the results of the post mortem examination was forwarded from Smith's office to the general agent on the last-mentioned date. On October 10 Dr. Pond paid the $15 premium to Smith, who issued a receipt therefor and delivered the policy to him.

Charles M. Wilson, manager of Nason's office, and head of the indemnity insurance department thereof, testified that Smith himself called at the office in San Frrancisco about October 9, and claimed that Dr. Pond's policy had been incorrectly dated; that on this last-mentioned occasion the witness examined the records of the office, and found that Russell B. Adams, an "underwriter and clerk" in the office, had changed the date of the original application to October 3; that, "as a matter of custom" he, without consulting the general agent or any of his staff, then changed the date of the policy to conform to the time of the receipt of the application—September 25—and delivered the policy with the altered date to Smith. Wilson then knew that "Dr. Pond had an accident to one of his employees."

Nason himself testified that he did not learn of the accident until "'after October 3. * * The first that came to my attention was that I was informed that the claim adjuster was called upon by Mr. Wilson

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to go to Napa to attend the coroner's inquest. * * * That was the first that I knew. * * * Q. As a matter of fact, you are not familiar with the details of your office? A. Absolutely not. Q. You left it to your manager, did you not? A. Yes; unless some trouble arose over a matter I wouldn't interfere at all."

The following testimony was given by Russell B. Adams:

Q. State whether or not on behalf of Arthur G. Nason & Co. you accepted said application * * * from * * * Dr. Milo B. Pond. A. The application was not accepted. Q. Please state what action you took upon the said application. * * * A. On receipt of the application I noted the premium specified was not up to our charge. A letter was written by me to Smith advising of this, and saying the application would be held pending his advices. Q. In acknowledging the said letter from * * * Smith * * * state whether or not it was your intention as representative of * * * Nason * * * to hold * * * Dr. Pond covered under a policy. A. It was not my intention to cover the risk. Q. Please state what your intentions were as to the said application. A. To hold it until advised by our agent as to whether the insurance was desired at the higher rate. Q Was it at any time subsequently to the receipt of the application your intention to bind or consider said application of any force or effect, or as constituting any insurance covering Dr. Pond? A. No. * * * No instructions were ever given me to bind this risk or to write a policy. Q. In issuing a binder for such policy * * * what has been your custom while employed by Nason? A. A record of risks bound was kept by Nason. The name, date covered, and nature of covering was always kept. Q. Please state fully what course you would have taken had you intended * * * to hold Dr. Pond covered under a policy. * * * A. A binder would have been issued and recorded as above; in any case there would have been a record of any covering granted."

The respondents in their reply to petitioner's supplemental brief take a different position with regard to the evidence as to when Dr. Pond expressed his willingness to accept the $15 rate from that stated in their first brief. It is insisted in their last position that—

"At the time of the application for a renewal Dr Pond was told by Mr. Smith that the premium would be raised, and that it would be probably $15 as a minimum. Dr. Pond thereupon informed Mr. Smith that the amount of the premium was immaterial—that he wanted a policy. * * * Respondents contend that this made a complete meeting of minds on the only issue—the premium."

From this it is argued that *the letter of September 29 "was superfluous, and should not in any way be considered* in this cause, for the reason that Smith had already been told by Dr. Pond that he wanted the policy regardless of the amount of the premium." (Italics ours.) In their first brief respondents state that—

"On September 24, 1917, Pond applied to Smith at Napa for a policy. * * * *There may or may not have been some discussion between Smith and Pond * * * concerning the premium * * * at the time the application was made.. It is immaterial.* * * The offer of Dr. Pond when it reached the office of the general agent * * * was refused. * * * The petitioner made a new offer to extend coverage to Dr. Pond * * * at an increased price. * * * This offer of petitioner is contained in the letter to Smith * * * under date of September 26 * * * and in the letter from Smith to Dr. Pond under date of September 29. The offer thus made by petitioner was never at any time withdrawn. Indisputably it was accepted by Dr. Pond * * * *What happened in the interim is of no consequence."* (Italics ours.)

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We do not agree with respondents, as will appear from our discussion, that the letter of September 29 was "superfluous," or that "it is immaterial" what discussion was had on September 24. One reason for setting forth at length the variant positions of respondents is that our interpretation of the findings on this point may appear more clearly. The use of the relative terms "before" and "after" in the sentence relating to the notification to Dr. Pond of the increased rate precludes the idea that the commission meant to find that there was a meeting of minds on September 24. As already shown, Smith's testimony was that he personally had only one interview with Dr. Pond about the rate—after the accident on October 2. We shall assume, for the purposes of this discussion, that the commission found that Smith did discuss the rate with Dr. Pond on September 24. Dr. Pond is less definite as to the number of times he canvassed the premium rate with Smith, but we think his testimony indicates that he meant to convey the impression that he saw Smith three times: (1) on September 24; (2) on a later date before Smith had received the letter of September 26; and (3) after Dr. Pond had received the letter of September 29—but as to this he would not say definitely whether it was before or after the accident. Indeed, Dr. Pond did not testify definitely to any date except October 2, when he called at Smith's office after Lamb was injured. There is further disagreement in the testimony in that Smith stated that he did not know of the increased rate until he received the letter of September 26, while Dr. Pond claims that the higher premium was discussed when he ordered the "renewal."

[1] We have said that the finding cannot be interpreted to mean that the contract was concluded on September 24, nor do we think it can be ascertained therefrom when, according to the commission, Dr. Pond consented to the rate. And, unless the conjunctive "thereupon" connotates an interval between the notification and the consent, it cannot be determined whether the commission found that the rate was agreed upon before or after the injury. Do the findings refer to the second occasion mentioned in Dr. Pond's testimony? The plausible theory is that they do. The word "thereupon" could properly have reference only to an occasion where there was at once a proposal and an acceptance. The term would not describe either of the other occasions. Considered in connection with the statement that he "again" requested that the policy be issued, "thereupon" indicates that he accepted the rate immediately, and "again" connects up with the original request for a "renewal." And, as further supporting this theory, is the circumstance that, according to the same finding, Smith did not then know what the amount of the premium would be. We think it clear that the finding does not refer either to the first or to the third occasion mentioned in the testimony of Dr. Pond. The word "thereupon" could not allude to the interval—however brief it may have been—between the receipt by Dr. Pond of the letter of September 29 and the interview which followed in Smith's office. Moreover, it is shown by the letter of September 29 that when Smith sent it he did know "the exact amount of such increase." It is also to be noted that in the sentence we are discussing the phrase found in the preceding sentence—"and before the 2d day of October"—is significantly missing. In our opinion it was important for the commission to find whether Dr. Pond accepted the rate on the first, the second, or the third of these occasions, for if it was upon the first or second occasion we should be obliged to declare that the findings are not supported by the evidence. Upon the receipt of the application, whatever the scope or extent of Smith's authority may have been—and we shall consider this later—the matter of the rate was taken out of his hands by the letter from the general agent of September 26, which constituted a counter offer. So that, up to the time Dr. Pond accepted the counter offer, there was no meeting of minds on one of the elements of the con-

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tract. This would be true even if the testimony of Dr. Pond was accepted by the commission that he stated on the first occasion he wanted the insurance, though the premium might be more than $15, or when he was in Smith's office on the second occassion, for upon the counter offer he was called upon either to accept it or to reject it definitely. We must conclude, therefore, that the commission based its findings on the first or second occasion, or both, and not upon the period following the receipt by Dr. Pond of the letter of September 29, although if the findings did relate to the last occasion we are not to be understood to say that the evidence would be sufficient. We are fortified in this conclusion by the testimony of Dr. Pond himself. He admits that he went to Smith's office *after* the injury. He does not say that he called at any other time on October 2, or that he was in the office more than once after he got the letter. Nor is his testimony definite as to whether he received the letter before or after the accident. We are not losing sight of his testimony that he reported to Smith "immediately" on receipt of the letter; that he thought he received it and saw Smith before Lamb was hurt; that on the second occasion he offered and Smith refused his check; that his purpose in going to Smith's office on October 2 was again to tender the premium and receive the policy; and that "I did go to Mr. Smith before the accident to tell him it was all right verbally.' But, in any event, in our opinion the evidence would not support a finding that Dr. Pond accepted the rate at any time prior to the afternoon of October 2.

[2, 3] It is well settled that the findings of the commission upon questions of fact are conclusive where there is any substantial evidence to support the award. Western Indemnity Co. v. Pillsbury et al., 172 Cal. 807, 159 Pac. 721; Mass. B. & I. Co. v. Industrial Accident Commission, 176 Cal. 488, 168 Pac. 1050. Upon the question of fact we have been discussing, however, taking into account all the pertinent evidence bearing on the point, the apparently consistent and convincing testimony of Smith—supported as it is by the correspondence and the sequence and import of events concerning which there is no dispute, the uncertain testimony of Dr. Pond in most particulars—especially in respect to the time when he acted upon the letter of September 29, and the lack of clearness and definiteness in the findings on the conflict in the evidence —if it can be said that the evidence is really involved in conflict as to the time of his acceptance, we are constrained to declare that, even if the findings are to be interpreted as meaning that Dr. Pond had accepted the counter offer prior to the accident, they are, nevertheless, without support in the evidence. We are not prepared to say, however, that if Dr. Pond had, with some regard for certainty and precision, fixed his acceptance as of a time prior to the casualty we would set aside the finding. We do not think that his testimony can be said to contradict that of his own witness, Smith, on the point that it was sufficiently definite to raise a conflict, or, if there was a conflict, that the findings in any true sense resolved it.

[4] Having reached the conclusion that a contract was not concluded prior to the injury, we shall now dispose of petitioner's objection to the finding that Smith was the agent of the company in the transaction. It is claimed in the brief of petitioner that—

"Smith had not been given, and did not have and never attempted to exercise any power or authority over the policies of the company, except to receive and deliver the same, * * * and at no time did he have or claim that he had the right to fix the rate or to execute, issue, sign, countersign, or modify a policy issued by this company. * * * "

Smith testified that he was the agent of petitioner, and not of Dr. Pond. If this be true it might be held that if Dr. Pond had, prior to the

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accident, notified Smith of his acceptance of the counter offer the contract would thereupon have been completed, notwithstanding that Smith did not communicate such acceptance to his principal before the loss occurred. "If the applicant accepts the terms granted by the company the contract is considered complete, without waiting for the local agent to communicate the acceptance to the company." Cooley, Briefs on Insurance, vol 1, p. 424. See, also, Tayloe v. Merchants', etc., Co., 50 U. S. (9 How.) 390, 13 L. Ed. 187; Carter v. Bankers' L. I. Co., 83 Neb. 810, 120 N. W. 455; Joyce on Insurance, vol. 1, p. 230. But on this question it must be kept in view, as tending to show that in the mind of at least one of the parties the contract was not complete, that Smith waited until he heard from Dr. Pond concerning the counter offer before ordering the policy, and that when he did hear from him he promptly notified the general agent.

[5] It is to be noted, however, that the commission did not in its findings determine the character and scope of Smith's authority as agent for petitioner, and this renders it necessary next to consider whether he could bind petitioner by a parol contract of insurance. Smith testified that "binders" were used in San Francisco, but not in Napa; that he issued none in this instance, but that he had been "advised by Mr. Nason and Mr. Wilson * * * that before the policy is issued the applicant is covered * * * from the date of the application." Smith's own position—erroneously assumed, as we shall see—was that coverage was effected from the date of the application, notwithstanding the contract was not completed before the loss. Wilson, when he was asked whether Smith was "authorized to bind the company from the date of the application, * * *" answered, "I don't know." Nason's position was stated as follows:

"Q. Is it your custom during that interim [between the original application and the final acceptance or rejection thereof] to consider the man or the assured covered? A. Not unless a binder is given."

Dr. Pond testified:

"Q. But on October 2d, was it after the accident you called again at Mr. Smith's office? A. It was. Q. And did Mr. Smith at that time tell you that the policy had been applied for or had been issued? A. He told me it had not only been applied for, but I was perfectly secured. * * * Q. Did he tell you positively that he had made application to the insurance company for you to have a policy issued in your favor? A. Showed me a copy of the application. Read it to me to show that I was secured. * * * Q. Doctor, did Mr. Smith tell you you were wholly covered? A. Yes. Q. And you never considered that you did not have any insurance? A. I never questioned it for a moment."

From this testimony it would appear that Smith did not give assurances of coverage to Dr. Pond until after the accident. This is in accord with the former's testimony, for, as already shown, he said he saw Dr. Pond only once—on the afternoon of October 2. Smith also testified that he had not been in the habit of issuing policies for petitioner, and that the invariable custom was to send the applications to the general agency, where the policies were issued and forwarded to him for delivery. We shall assume that Smith was, for certain purposes at least, petitioner's agent; but neither in the testimony we have just quoted, nor elsewhere in the record, is there a particle of evidence to indicate that he had authority to bind petitioner by parol. Hence, even if the commission had meant so to convey by its finding that Smith was "the duly accredited and authorized agent of * * * Western Indemnity Company," and if Smith had given assurances of coverage to Dr. Pond before the injury—and not afterwards—as the fact seems to be, still such a finding would be without support in the evidence.

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[6] We turn now to the question whether the finding "that it was the custom and the practice that an assured was covered by the insurance, subsequently provided in the policy, from the date of his application," may be sustained. We cannot determine from the record whether the commission intended to find that such "custom and practice" was followed as well when the contract of insurance was not concluded before a loss as when it was. If the former, from the conclusion we have already reached as to when the contract was completed, we must hold that the finding is not supported by the evidence. In addition to Smith's testimony that he was advised by the general agent and Wilson that an ap-applicant was covered from the date of his application, he stated that in all the policies he had received from the company, the date corresponded with that of the application, but he admitted that he had never, except in this instance, sent in an application to petitioner whose terms were not acceptable. Wilson's testimony corroborates that of Smith on the point that the policies sent to him had always borne the date of the application, so as to provide coverage from the beginning, but he does not state that such custom and practice were observed where the terms of an application were not unconditionally accepted by the company. The testimony of Nason and Adams, which we have quoted, tends to show positively that this custom and practice did not prevail in such circumstances. It seems to us that this finding is without support in the evidence.

It only remains to consider whether, where the loss has occurred before the parties had come to an understanding upon the terms of the contract, the general agent has authority to issue a policy so as to cover the uncovered loss. The cause was argued before this court and submitted for decision. The submission was subsequently vacated, and the cause set for further argument upon the questions:

"(1) As to the authority of the general agent of a foreign insurance company after a loss not amounting to a total loss has occurred to the knowledge of the agent, to deliver a policy of insurance antedated so as to cover the loss, there being at the time no binding agreement for the insurance between the insured and the company; and (2) as to the authority in the particular case of Wilson, the employee of the general agent, to make such delivery on behalf of the general agent, assuming that the general agent had himself such authority."

After the above order of resubmission the respondent commission filed a supplemental brief in which, among other points, it is urged that "the actions of the employees of Nason Company were the actions of Nason Company," and in support of the contention the following authorities are cited: International Trust Co. v. Insurance Co., 71 Fed. 81, 17 C. C. A. 608; Mound City Ins. Co. v. Huth, 49 Ala. 529; Electric Ins. Co. v. Fahrenkrug, 68 Ill. 463; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Mayer v. Ins. Co., 38 Iowa, 304, 18 Am. Rep. 34; Bodine v. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566. But we do not deem it necessary to discuss this point, and we shall, therefore, proceed on the assumption that the acts of Wilson and Adams stand as the acts of the general agent just as if Smith had dealt directly with him.

The policy was introduced in evidence, and contained the following provisions:

"K. No assignment or change of interest and no change, waiver, or extension of any of the terms or conditions of this policy shall be valid, unless indorsed hereon and signed by an officer of the company, nor shall notice to any agent or any other person be held to effect a waiver or change in any part of the policy. * * * M. The term of this policy shall be twelve months from October 3, 1917, beginning and ending at

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twelve o'clock noon, standard time, at the assured's business address stated herein."

It is contended by petitioner that as Nason, according to his own testimony, was not an officer of the company, the alteration of the date of the policy was not binding on petitioner, the policy did not cover liability prior to October 3, and therefore petitioner was not the insurance carrier of Dr. Pond at the time of the accident. But, as the decisive question here is whether the general agent had authority to issue a policy covering a known loss, rather than whether he was authorized to alter a policy properly issued in the first place, we are not called upon to discuss the provision in clause K.

[7] The general rule covering this question is thus stated in Cooley's Briefs on Insurance, vol. 1, at page 354:

"It may * * * be regarded as elementary that an agent has no authority to insure goods which he knows to have already been destroyed by fire."

And this rule finds support in the following cases: Mead v. Phenix Ins. Co., 158 Mass. 124 [32 N. E. 945]; Clark v. Ins. Co., 89 Me. 26 [35 Atl. 1008, 35 L. R. A. 276]; Stebbins v. Ins. Co., 60 N. H. 65. And in Waterloo Lumber Co. v. Ins. Co., 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. (N. S.) 539, the court said:

"It has frequently been held that an agent has no authority to insure property already destroyed. *. * * "

See, also, Bentley v. Columbia Ins. Co., 17 N. Y. 421; 28 Cent. Dig. p. 703; 11 Dec. Dig. Ins. § 127. The principle laid down in these authorities is equally applicable to compensation insurance.

Whether or not the insurer, under all the circumstances, could have issued a policy which covered the loss—either total or partial—the authorities we have cited sustain the proposition that, unless there is a subsisting contract of insurance when the loss occurs, a general agent, in the absence of express authority, has no power to issue a policy. We think it has been made clear that in this case there was no contract in force at the time of the injury. One was written on the day following the loss, but was never "issued" until it was delivered to Smith on October 9. Before that time the date of the application had been changed from September 25 to October 3, and the policy from October 3 to September 25.

The following cases are cited in the brief filed by the respondent commission in support of the proposition that a general agent has authority to issue a policy covering a known loss and binding on his principal: New York Ins. Co. v. Russell, 77 Fed. 103, 23 C. C. A. 43; Insurance Co. v. Colt, 87 U. S. (20 Wall.) 560, 567, 22 L. Ed. 423; Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298; Schultz v. Phœnix Ins. Co. (C. C.) 77 Fed. 374, 392; Kennebec v. Insurance Co., 6 Gray (Mass.) 204; Warner v. Insurance Co., 14 Wis. 345; Komula v. Gen. Assurance Co., 165 Wis. 520, 162 N. W. 919. These authorities are distinguishable from the case here in that in each of them, prior to the loss, the insured had signified his acceptance of the terms offered by the insurance company, and thus a contract of insurance had been concluded. No authority has been cited, and we are aware of none, holding that a general agent, unless specially authorized, may issue a policy for a known loss, where the terms of the contract of insurance had not already been settled upon.

The general rule is that whenever the parties have entered into a contract before the loss occurs or the policy has been issued, unless the authority of the general agent is expressly delimited, the policy, when issued, by operation of law relates back to the application, and is dated accordingly—the policy being thereafter merely evidence of the contract; but this general rule has no application where the parties were not un-

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der contract at the time of the injury, and the general agent is without special authority to issue a policy to cover the loss.

Since it appears, then, that no contract of insurance was concluded prior to the accident, that Smith had no authority to bind petitioner by a parol contract of insurance, that the "custom and the practice" found by the commission to have been followed did not extend to a case where, at the time of the loss, the parties had not agreed upon the terms of the contract, and that the general agent was, in such circumstances without authority to issue a policy it follows that the findings cannot be sustained.

The award is annulled.

We concur: Angellotti, C. J.; Shaw, J.; Olney, J.; Lennon, J.

WILBUR, J. I dissent. The evidence shows that the Workmen's Compensation Law did not apply to Dr. Pond until, at the soliciation of the agent Smith, he elected to be bound by its terms. The effect of his election was to charge him with responsibility for the injury to his employees under the terms of that law, even if he was wholly without fault, as in this case. Because of such election Dr. Pond evidently intended to keep covered by insurance. Accordingly he notified Smith, petitioner's agent, that he desired an indemnity policy, dating from the expiration of his existing insurance, and that he was willing to pay whatever premium was charged by the company. The petitioner offered its insurance policies for sale to the public generally at a fixed and uniform rate. The terms and provisions of the policy being thus fixed, the question of insurance turned upon the willingness of the prospective policy holder to pay the premium demanded therefor by the company. At the time Dr. Pond applied to Smith for the policy he stated that he was willing to pay the premium, whatever it might be. Instead of communicating this fact to the general agent, Smith inserted in the written application the amount of the premium as $10. This resulted in the complications detailed in the main opinion. The evidence discloses that the company was willing to write the policy, and that Pond was willing to pay the amount of the insurance, and this willingness had been communicated by the one to the other. The whole difficulty arose from the failure of Smith to state in the written application for insurance the fact that Dr. Pond was willing to pay the increased premium. This was not the fault of Dr. Pond. The policy applied for was one dated September 25, 1917, and the policy finally issued and paid for was so dated. Wilson, to all intents and purposes, was the general agent of the company. He conducted the entire business of the general agent, in the name of the general agent, without consultation with him. Upon the insistence of Smith that Dr. Pond was entitled to a policy dated September 25, 1917, in accordance with the custom of the office he issued such a policy so dated, after knowledge of the accident, which policy covered the liability here sought to be enforced. In view of the delay caused by the failure of its agent Smith to communicate to the general agent the facts, namely, the willingness of Dr. Pond to pay the premium asked, which would have resulted in the prompt issuance of the policy, it would seem that common honesty demanded of the defendant that it accept the responsibility due to the delay of its own agent in communicating a correct statement of the actual terms of the application. The finding of the ultimate fact by the commission was that the written policy which by its terms covered the accident was binding by reason of a previous oral negotiation between the parties. I think the evidence is sufficient to justify this finding. Under somewhat similar facts in Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298, it was held under the circumstances there stated that the acceptance of the rate by the insured in a communication to the local agent was sufficient to bind the company where the rate had been previously fixed by the general agent, and that, although no policy was ever issued,

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the insurance company was bound. The only difference in the two cases in principle is that in the case at bar the information that the applicant was willing to pay the premium demanded was communicated to the local agent before the premium was fixed by the general agent, and in Eames v. Home Ins. Co. it was communicated afterward. In neither case did the information that the applicant was willing to pay the premium demanded reach the general agent in time for the issuance of the policy before the loss, while in Eames v. Home Ins. Co. the policy was never issued, and in the case at bar it was issued with full knowledge of the fact. I think that Dr. Pond had signified his acceptance of the terms offered by the insurance company and thus a contract of insurance had been concluded.

SCHILLING v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. (Civ. 3385.)

(District Court of Appeal, First District, Division 2, California. April 21, 1920. Rehearing Denied May 13, 1920.)

190 Pacific Reporter, 373.

1. MASTER AND SERVANT—COMPENSATION ACT AUTHORIZES COMMISSION TO FIX FEES OF CLAIMANT'S ATTORNEYS.

The Industrial Accident Commission has authority, under Workmen's Compensation Insurance and Safety Act, §§ 24(b) (1), and 24(d), to fix the fees of attorneys representing a claimant.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

2. MASTER AND SERVANT — COMPENSATION ACT MERELY AUTHORIZES DETERMINATION OF REASONABLENESS OF ATTORNEY'S FEE.

In fixing the fee of claimant's attorney under Workmen's Compensation Insurance and Safety Act, §§ 24(b) (1) and 24(d), the jurisdiction of the Industrial Accident Commission is confined to determination of the reasonableness of the fee for the services in the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for services in independent proceedings, though the contract is made payable out of the award of compensation made by the commission.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

3. MASTER AND SERVANT — COMPENSATION COMMISSION BOUND TO GIVE ATTORNEY FAIR HEARING ON QUESTION OF REASONABLENESS OF FEE.

If a claimant under the Workmen's Compensation, Insurance, and Safety Act, who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered, seeks to avoid the obligation of the contract after the services have been rendered and the profits retained by him, the attorney is entitled to a fair hearing before the commission on the question of the reasonableness of the fee agreed to be paid

(For other cases, see Master and Servant, Dec. Dig. § 420.)

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Proceeding by John B. Costello under the Workmen's Compensation Act to obtain compensation for personal injuries. Application by Frank Schilling for certiorari to review an order of the Industrial Accident Commission fixing his compensation for legal services. Order annulled.

Frank Schilling, of San Francisco, pro se.
A. E. Graupner, of San Francisco, for respondents.

PER CURIAM. Petitioner instituted this proceeding in certiorari to review the order of the Industrial Accident Commission fixing his compensation, after rehearing, for legal services rendered to an applicant for compensation under the provisions of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831).

It appears from the record that the applicant, having been injured while in the course of his employment, consulted petitioner, who is an attorney at law, and through his advice and counsel procured temporary compensation from the insurance carrier; that thereafter he obtained other employment, during the course of which he was again injured and again cousulted petitioner; and that thereafter, as the result of further consultation with petitioner, he was advised that he might apply for permanent compensation as the result of the first injury upon medical testimony which it was deemed possible to procure at that time. This application was made through the advice and assistance of petitioner, and a partial hearing was had thereon before the commission, wherein the evidence was very unfavorable to the applicant; but thereafter, through the advice and activities of petitioner a settlement was made with the insurance carrier for $650, which was approved by the commission and subsequently paid. It further appears that at the time of the approval of this settlement the commission fixed the compensation for petitioner's legal services at $45 without a hearing; that at the request of petitioner a rehearing was granted by the commission for the purpose of determining the reasonableness of the order fixing such fee. Petitioner claimed that he had an oral contract with the applicant for the payment of one-third of the amount recovered from the insurance carrier, which amount included payment for legal services rendered by him to the applicant in matters not directly connected with the proceeding in which the recovery was had. He insisted that this contract should not be declared void in toto, and that in any event the allowance of $45 was wholly unreasonable in payment for the legal services which he had rendered in the proceeding before the commission.

As disclosed by the record filed by respondent herein, the attitude of the referee to whom the rehearing had been referred by the commission was extremely hostile and prejudicial to petitioner throughout the entire proceedings. Immaterial and irrelevant testimony was taken for the purpose of attacking the professional standing of petitioner; the referee took petitioner's witnesses out of his hands conducted their examination in his own way, refused to permit petitioner to cross-examine witnesses who were antagonistic to him, and studiously obstructed petitioner in his attempts to produce testimony favorable to his cause.

[1, 2] Counsel for respondent states that there is but one question involved in this proceeding, "What was the value of the services performed by petitioner, * * * " or "Has the Industrial Accident Commission authority under sections 24 (b) (1) and 24 (d) of the Workmen's Compensation, Insurance, and Safety Act, to fix the fees of attorneys representing applicants before it?" This court is unable to determine the value of the services performed by the petitioner because the referee to whom that matter was referred for adjudication failed to give petitioner a fair opportunity to make proof of such value. That the Industrial Accident Commission has authority under the sections cited to fix fees

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can scarcely be questioned. Section 24, subdivision (b) (1), authorizes the commission to fix and determine a reasonable attorney's fee for legal services pertaining to any claim for compensation or application filed therefor. No constitutional objection has been raised to this provision of the act, and it may therefore, in this proceeding be taken for granted that the power is one which the commission may lawfully exercise. Subdivision (d) of the same section provides that "no claim or agreement for the legal services or disbursements * * * in excess of a reasonable amount, shall be valid or binding in any respect, and it shall be competent for the commission to determine what constitutes such reasonable amount." No constitutional objection has been raised to this provision of the act, and for the purpose of this proceeding it also may be assumed to be valid. But it must be evident that if the obligation of a contract to pay for legal services, which has been executed by parties legally competent to contract, is to be impaired by the order of the commission solely on the ground that it is unreasonable, some semblance of a judicial hearing must be accorded the contracting parties before such order is made. Furthermore, the jurisdiction of the commission is confined to the determination of the reasonableness of the fee to be paid to counsel for the legal services rendered to the applicant in connection with the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for legal services rendered in independent proceedings, even though such contract is made payable out of the award of compensation made to the applicant by the commission.

[3] An applicant for compensation is entitled to be represented by counsel in proceedings before the commission. There is no odium attached to counsel who render such services. Though the efforts of the commission to protect the interests of applicants for compenstion are highly commendable, it is just as important that other persons coming within its jurisdiction be treated with equal justice. If a party who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered seeks to avoid the obligation of such contract after the services have been rendered and the benefits retained by him, the attorney is entitled to a fair and impartial hearing before the commission on the question of the reasonableness of the fee which the contracting parties had agreed should be paid.

That petitioner in this case did not receive such a hearing is too plain to question. The award of $45 as compensation to petitioner for the services admitted to have been rendered by him in the proceedings before the commission is less than the ordinary charge made by attorneys for the collection of a promissory note without any form of legal proceedings. Upon the meager showing petitioner was permitted to make it is apparent that the fee allowed was unreasonably low for the services rendered. But as heretofore stated, it is impossible for this court to determine what allowance should be made for the services rendered, because the referee failed to permit petitioner to fairly present his evidence on that issue.

For these reasons the order of the commission is annulled.

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SAUNDERS ET AL. v. NEW ENGLAND COLLAPSIBLE TUBE CO. ET AL.

(Supreme Court of Errors of Connecticut. June 10, 1920.)

110 Atlantic Reporter, 538.

1. MASTER AND SERVANT — ENTIRE FINDING AND MEMORANDUM DECISION OF COMPENSATION COMMISSIONER MUST BE READ TOGETHER AS A WHOLE.

On appeal from an award of the workmen's compensation commissioner, the entire finding and the memorandum decision are to be read together as a whole.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT HAS BURDEN OF PROOF.

One claiming compensation under the Workmen's Compensation Act has the burden of proving the statutory essentials of his case, and he must establish by competent evidence that his injuries arose out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT — COMPENSATION COMMISSIONER'S FINDING BASED UPON INFERENCE CANNOT STAND IF UNREASONABLE.

Upon appeal in workmen's compensation case, where an essential finding is based upon inference, if the inference is one which a reasonable man could not draw in a reasonable way the finding cannot stand.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—FINDING OF INJURY IN COURSE OF EMPLOYMENT WITHIN COMPENSATION LAW HELD REASONABLE.

Where a 15 year old girl employed in a factory was accustomed daily to take elevator in going to and from work and in getting material when needed, or in taking finished work to another department, and was killed by a descending elevator, a finding that she was engaged in fulfilling the duties of her employment when killed *held* not an unreasonable inference.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT—ONE FOUND INJURED AT PLACE WHERE DUTY LIES PRESUMED INJURED IN COURSE OF EMPLOYMENT WITHIN COMPENSATION ACT.

In workmen's compensation cases there is a natural presumption that one charged with the performance of a duty and found injured at the place where duty may have required him to be is injured in the course of and as a consequence of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

8. MASTER AND SERVANT—POWERS OF APPELLATE COURT TO WEIGH EVIDENCE IN COMPENSATION CASE DEFINED.

The superior court, on appeal from the findings of the compensation commissioner, does not weigh evidence, but it may determine whether the finding of the commissioner should be corrected or not, or whether there was any evidence to support the conclusions reached.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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Appeal from Superior Court, New London County; Joel H. Reed, Judge.

Proceedings by John Saunders and others under the Workmen's Compensation Act to recover for the death of Genevieve Saunders, opposed by the New England Collapsible Tube Company and others. Finding and award by the compensation commissioner in plaintiffs' favor was set aside by the superior court, and plaintiffs appeal. Reversed with directions.

Frank L. McGuire and Clayton B. Smith, both of New London, for appellants.

Philip Pond, of New Haven, for appellees.

WHEELER, J. The plaintiff's intestate, Genevieve Saunders, 15 years of age, was employed by the New England Collapsible Tube Company on the third floor of its factory. A number of girls worked on this floor with the deceased. The factory building consisted of several floors, and it was necessary for the girls employed in the factory to go from one floor to another for the purpose of getting material as needed, or for the purpose of taking finished work to another department. It was customary for the girls so employed daily to use the elevator for this purpose, and they also used the elevator in going to work in the morning or at noontime and in leaving their place of employment at night.

The decedent used this elevator in this way during the period of her employment with the defendant. On October 24, 1918, and during working hours the decedent left her bench and went to the elevator and leaned her head over the gate, and the elevator descending crushed her head between the top of the gate aand the bottom of the elevator.

No testimony was offered before the commissioner that at the time of her injuries the decedent was about to use the elevator in the course of her employment, or that at this time she had occasion to so use the elevator. The commissioner awarded compensation to the claimants.

The superior court on appeal held that the commissioner erred in holding that the injuries arose out of and in the course of her employment and in requiring the defendants to prove that the injury did not arise out of and in the course of the employment. The court set aside because it could find no evidence from which it could be found that the accident arose in the course of the employment. And the court interpreted the commissioner's finding that "There was no evidence to show that this Saunders girl had reason to use this elevator on this particular day, at this particular hour, nor is there evidence to the contrary," as meaning that there was absolutely not evidence from which the commissioner could find the ultimate fact that the accident arose out of and in the course of her employment.

[1] The entire finding and memorandum of decision are to be read together as a whole. So read, we think it clear that by the words "there is no evidence" the commissioner intended to convey the meaning that there was no testimony, no statement either from a witness or in a written document of this fact, that is, that there was no direct evidence, as it is called in common speech, of this fact. But he did not intend to exclude from consideration the realm of inference and it was in reliance upon the inference to be drawn from facts in evidence that the commissioner reached his conclusion. The court was in error in thinking the commissioner required the employer to assume the burden of proving that the injury did not arise out of and in the course of the employment.

[2] The burden of proof in a claim for compensation under the Workmen's Compensation Act (Pub. Acts 1913, c. 138, as amended by Pub. Acts 1915, c. 288) is upon the claimant to prove the statutory essen-

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tials of his case. He must establish by competent evidence that the injuries for which he seeks compensation arose out of and in the course of his employment. Sponatski's Case, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; Westman's Case, 118 Me. 133, 106 Atl. 532, 535.

What the commissioner did was everyday practice with a trial judge; he found the fact in issue as an inference of fact drawn from other facts in the testimony.

[3] The appeal fairly raises the question whether the inference drawn was unjustifiable. If it was an inference which a reasonable man could not draw in a reasoning way the finding cannot stand, for it would then be so unreasonable as to justify judicial interference. Powers v. Hotel Bond Co., 89 Conn. 143, 93 Atl. 245. No one saw the accident, but that fact is not fatal to a finding of how it occurred It occurred within the period of the employment, at a place where the decedent might reasonably have been, and where her work required her frequently to be. Her duties required her to use the elevator in going from floor to floor for the purposes of her employment. If she was so engaged she was reasonably fulfilling the duties of her employment.

[4] Whether she was so engaged at the time of her injury seems to us an inference which cannot be said to be an inference of a character which the reasonable man could not draw. Is it more likely than otherwise that one injured during the period of employment and in a place where he had a right to be was at this time engaged in her employment, or upon some matter of her own and apart from her employment?

[5] There is a natural presumption that one charged with the performance of a duty and found injured at the place where duty may have required him to be is injured in the course of, and as a consequence of, the employment. We think it more likely than otherwise that the decedent was doing her duty when injured, and that this is a reasonable inference to draw in the absence of evidence to the contrary.

[6] Facts may be found proven of which there was no direct proof, but which are inferences of fact drawn from facts which are in proof. Sliwowski v. N. Y., N. H. & H. R. R. Co., 94 Conn. —, 108 Atl. 805.

[7] It is the duty of the trier to infer what one has done or left undone, although there be no positive testimony of this. And when the appellate court passes upon whether this duty has been judicially performed by legal standard it cannot inquire whether it would have reached the same result; it must limit its inquiry to the ascertainment of whether the inference is so unreasonable as to be unjustifiable. It is the right of every trier to infer what one's conduct has been in the circumstances, even though the inference reaches beyond the positive testimony in the case. Bunnell v. Berlin Iron Bridge Co., 66 Conn. 24, 36, 33 Atl. 533; Union Bank v. Middlebrook, 33 Conn. 95, 100; Dubuque v. Coman, 64 Conn. 475, 479, 30 Atl. 777.

The appellants urge as one ground of error the use by the court of the evidence for the purpose of determining the validity of the award. They say that when the court denied the motion to correct the limited purpose of the evidence had been satisfied. The motion to correct was not filed in the superior court, and hence was not before the court.

The evidence was before the court to enable it to determine whether there was any evidence that the injuries of the decedent arose in the course of and out of her employment. The court held that there was not. "Here," says the court, "the theory that the decedent was injured while on some purpose of her own, outside of her employment, is equally consistent with the theory that she was acting within her employment."

[8] Though this were true, it was the province of the commissioner to determine which theory was supported by the evidence. And if the evidence reasonably supported either theory he might adopt that theory,

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and the superior court on appeal could not disturb his decision upon that ground. The superior court does not weigh evidence in this class of cases; it may determine whether the finding of the commissioner should be corrected or not, or whether there was any evidence to support the conclusions reached. And when it has done this its control over the evidence ceases.

There is error; the judgment is reversed, and the superior court is directed to enter judgment dismissing the appeal from the commissioner and affirming the award.

All concur.

ALDEN COAL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 13150.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 641.

1. MASTER AND SERVANT — "DEPENDENT," WITHIN COMPENSATION LAW, DEFINED.

A "dependent" is one sustained by or relying for support on the aid of another, or looking to another for support and relying on another for reasonable necessaries consistent with the dependent's position in life.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

2. MASTER AND SERVANT — DEPENDENCY QUESTION OF FACT DETERMINABLE BY COMMISSION.

The question of dependency is one of fact, and the court will not interfere with the decision of the commission, if there is evidence tending to sustain it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — MOTHER HELD NOT DEPENDENT ON SON AT TIME OF HIS DEATH.

Where son was managing mother's business, though not for pay, and it did not appear that he was contributing to her support, the fact that she wrote him to come to another state to work for her to help her, and that he was to go after getting money enough, being killed before he could go, did not show she was actually dependent on him at time of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Error to Circuit Court, Fulton County; G. W. Thompson, Judge.

Proceedings under the Workmen's Compensation Act by J. M. Hazlett, administrator, to recover compensation for the death of Arthur Eshelman, employee, opposed by the Alden Coal Company, employer. Award by the Industrial Commission was confirmed, and the employer brings error. Judgment reversed, and record of the Industrial Commission quashed.

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Henry Kueller, for plaintiff in error.

A. W. Kerr and W. J. MacDonald, both of Springfield, for defendant in error.

DUNN, J. The circuit court of Fulton county having confirmed an award by the Industrial Commission of compensation for the death of Arthur Eshelman, the Alden Coal Company, the employer, has sued out a writ of error to review the judgment.

The deceased left no widow or children, but was survived by his mother, Margaret Mohr, and the only question in the record is whether she was partially dependent on his earnings. The employer paid $150 to the administrator for burial expenses, and insists that no further compensation can be awarded under the statute (Laws 1913, p. 335).

Mrs. Mohr was the only witness examined. From her testimony it appears that her husband, the deceased's father, died on June 1, 1915, leaving four children: Arthur, the deceased, who was 18 years old; a brother, Harry, a year or two older; and a brother and sister, who were younger. On or before December 24, 1916, she married Henry Mohr and on that date went with him to Colorado, where they lived together until his death, which occurred on April 30, 1917. After her first husband's death she was the owner of a shoe and harness repair shop in Farmington, which was conducted for her by Arthur and Harry. Arthur received no wages or salary, and lived with his mother, who furnished him with clothes, board, and all his expenses. After Mrs. Mohr's marriage and removal to Colorado, the two brothers continued to conduct the shop until February, 1917, when Harry left, and from that time Arthur ran the shop until June, when it was sold. A payment of $75 was made on the sale, of which Arthur sent his mother $25. The remainder of the purchase price she collected after his death. He never received any compensation for running the shop, except that he paid his living expenses out of the receipts. He never sent her any money, and all the income from the shop was used by her authority to pay the expenses of the two young men, the debts incurred in the business, and an insurance premium on the lives of all the family. When Mohr died, he left, besides his widow, four heirs. He left 160 acres of land, but no money, and no will. Mrs. Mohr had no money or other immediate means of support, and she got Mohr's son to work the farm for half the crop. The only income she received from the farm was what was raised on it, and she got nothing from that source until October, 1917. She bought no clothes, did not have to pay rent, and bought necesary groceries on credit, paying the bills in October out of her receipts from the crops. After Mohr's death she wrote to Arthur to come out in June and work for her, to help her; but he did not want to go until he got a little more money, because he had not enough left after paying the bills. He was to come out after getting money enough, and so he went to work for the plaintiff in error on June 23, 1917, and was killed on July 16.

[1-3] If any compensation beyond $150 for funeral expenses was payable, it was by virtue of paragraph (c) of section 7, which provides for compensation to a parent "who at the time of the injury was dependent upon the earnings of the employee." A dependent is one who is sustained by or relies for support on the aid of another, or looks to another for support and relies on another for reasonable necessaries consistent with the dependent's position in life. The question of dependency is one of fact, and the court will not intefere with the decision of the commission, if there is evidence tending to sustain it. Rock Island Iron Works v. Industrial Com., 287 Ill. 648, 122 N. E. 830. Mrs. Mohr never received any part of her support from her son. Until April 30, before his death in July, she was living with her husband, and was presumably

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supported by him; certainly she was not sustained by the deceased, and did not rely upon his aid for support. She did not look to him for any necessaries of life, and there is no evidence tending to show that she either needed or received aid from him. He was managing her business, though not for pay, and the evidence does not tend to show that he was contributing to her support, rather than that she was contributing to his. After her husband's death she did not become dependent upon Arthur, but provided for herself from her own resources. Had he lived to carry out the arrangement contemplated by his mother and himself, a different question would be presented; but the question here is one of actual dependency at the time of the injury, and evidence of a proposed arrangement which might result in a condition of dependency in the future does not tend to show an actual, existing dependency.

The judgment of the circuit court is reversed, and the record of the Industrial Commission quashed.

Judgment reversed.

HENRY v. INDUSTRIAL COMMISSION ET AL. (No. 13151.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 714.

MASTER AND SERVANT — INJURY WHILE WORKING AT A DIFFERENT MACHINE THAN THAT ASSIGNED DID NOT "ARISE OUT OF AND IN COURSE OF EMPLOYMENT," WITHIN COMPENSATION ACT.

Injury to employee does not "arise out of and in the course of his employment," within Workmen's Compensation Act, where he was set to work at one machine, then worked at another, where he was seen by the foreman, and then, without the employer's knowledge, went to work at a third and different machine, where he was injured.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Carter, J., dissenting.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under Workmen's Compensation Act by Abe Grossman, opposed by Henry Henry, employer. Award by the Industrial Commission was confirmed, and the employer brings error. Judgment reversed and record of Industrial Commission quashed.

William A. Jennings, of Chicago, for plaintiff in error.
Shaeffer & Foster, of Chicago, for defendant in error.

DUNN, J. Abe Grossman, a young man 18 years old, was injured while working for the plaintiff in error on the first day of his employment, October 9, 1918. On his application the Industrial Commission made an award of compensation to him, which the circuit court of Cook county confirmed. A writ of error to the circuit court has been allowed.

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The only question is whether the injury to the claimant arose out of and in the course of his employment. He was employed to do punch press work, and was put to work by the foreman on a machine called a "kicker," which was operated by foot power and shaped pieces of tin used in the making of tin boxes in forms about four inches long, by turning up about a thirty-second of an inch at the edges Two other machines in the room where the claimant was put to work were also used in the making of the boxes, both of which were power-driven. The first of these (the cutting machine) punched the blanks for making the boxes out of strips of tin three or four feet long. The second was a forming press, which formed the boxes. This machine was guarded so that any one could run it, whether experienced or not, without any danger of getting hurt. It was the former machine by which the claimant was injured. This machine was not so strongly guarded as the other, was dangerous, and required care on the part of the operator to avoid injury.

The claimant testified that he worked on the press the foreman told him to work at about an hour, and completed all the work there was to be done on the kicker before he left it. He did not ask for more work to do on the kicker, but a young fellow whose name he did not know put him to work on the forming press and showed him how to run it This young man worked near him on the kicker, which the foreman had told the claimant to work on. Claimant worked on the forming press until noon and about three hours in the afternoon. The foreman came in and saw him working on this press, but did not say anything to him. About 4 o'clock the claimant had run out of work on the forming press, and the other young man told him to work on the cutting machine. Soon after he began working on this machine the accident occurred, by which the claimant's hand was caught in the machine and crushed, so that the fingers had to be amputated. He was warned by the other employees as to the dangerous character of the machine. The foreman had no knowledge of the claimant's working at this machine, and the young man who told him to work on the cutting machine had no authority to do so, or to control or direct him as to where he should work or what he should do, but, so far as the evidence shows, was merely an employee, with no more authority than the claimant. Another employee, named Gastoria, was in charge of the floor in the absence of the foreman, but there is no evidence that he had any authority to act as foreman or direct the work.

The compensation required by the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i) is only for accidents which arise out of and in the course of the injured person's employment. There is no liability for injury to a workman, unless the workman was at the time of the injury in the performance of some duty for which he was employed, and if a workman voluntarily, and without his employer's direction or acquiescence, undertakes work which he was not employed to do, he is not, as to such work, within the protection of the act. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; International Harvester Co. v. Industrial Board, 282 Ill. 489, 118 N. E. 711. The claimant was employed and put to work at a particular machine. There is no evidence that he was ever told to work at any other machine by any one acting by the authority of his employer. He went of his own will and worked at another machine for a time, and then of his own will again went to a third machine, where he was hurt. If knowledge of the foreman that the claimant was working at another machine would have made the employer liable for an accident happening at such other machine, that rule cannot apply to an injury happening at a third machine, where the claimant, without his employer's knowledge,

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was engaged in other work than that which he had been told to do, and was exposed to risks not incidental to such work.

The judgment of the circuit court will be reversed, and the record of the Industrial Commission quashed.

Judgment reversed.

Carter, J., dissents.

INTERNATIONAL COAL & MINING CO. v. INDUSTRIAL COMMISSION ET AL.. (No. 13083.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 703.

1. MASTER AND SERVANT — LUMP SUM SETTLEMENT UNDER WORKMEN'S COMPENSATION ACT WITHOUT APPROVAL OF INDUSTRIAL COMMISSION VOID.

An injured employee's lump sum settlement for a smaller amount than that awarded him by the arbitrator, made without a petition therefor or approval thereof by Industrial Commission, as required by Workmen's Compensation Act, §§ 9, 23, is void.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

2. MASTER AND SERVANT — EMPLOYER CANNOT RELIEVE HIMSELF OF LIABILITY UNDER WORKMEN'S COMPENSATION ACT BY CONTRACT WITH EMPLOYEE.

An employer cannot relieve himself of liability under the Workmen's Compensation Act by a contract with employee.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

3. MASTER AND SERVANT — COMPENSATION FOR DISFIGUREMENT OF AND ALSO FOR LOSS OF INJURED MEMBER IMPROPER UNDER WORKMEN'S COMPENSATION ACT.

Industrial Commission has no power to award compensation for disfigurement of a member, and also for the loss of the use thereof.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

4. MASTER AND SERVANT--COMPENSATION OR DISFIGUREMENT OF FACE AND HANDS AND ALSO FOR LOSS OF USE OF EYES AND ARMS PROPER UNDER WORKMEN'S COMPENSATION ACT.

Award of compensation for disfigurement of face and hands under Workmen's Compensation Act, § 8, par. (c), does not preclude awarding of compensation for loss of eyes and arms.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

8. MASTER AND SERVANT — EVIDENCE COMPETENT TO PROVE EXTENT OF DISABILITY WITHIN WORKMEN'S COMPENSATION ACT.

In workmen's compensation proceedings involving issue as to percentage of loss of use of employee's injured member, it is competent to prove conditions such as the comparative ability of employee to do certain

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things in the use of the injured member before and after the accident, as well as any other fact which will enable the commission to draw an inference as to the percentage of loss of use of the member.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

10. MASTER AND SERVANT — EMPLOYER HELD NOT ENTITLED TO CREDIT FOR COMPENSATION PAYMENTS UNDER ILLEGAL LUMP SETTLEMENT.

An employer, liable for compensation under Workmen's Compensation Act, is entitled to credit for payments of installments made under the act as they accrued up to the time of the final determination of the award by the Industrial Commission, but is not entitled to credit for payments beyond amount so paid under an illegal lump sum settlement.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

12. MASTER AND SERVANT—ILLEGAL SETTLEMENT MADE IN GOOD FAITH MAY BE CONSIDERED BY INDUSTRIAL COMMISSION ON PETITION FOR LUMP SUM SETTLEMENT.

That an employer, liable for compensation under Workmen's Compensation Act, has in good faith made a lump sum settlement, which is illegal, may be shown on petition to Industrial Commission for lump sum settlement, and may be considered in determining whether settlement should be authorized, and what the amount should be.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Error to Circuit Court, St. Clair County; J. F. Gillham, Judge.

Bill by the International Coal & Mining Company to review proceedings before the Industrial Commission by James Nicholas. Bill dismissed, and complainant brings error. Reversed and remanded, with directions.

R. W. Ropiequet, of Chicago, for plaintiff in error.

A. W. Kerr, of Springfield, and Fred H. Kruger, of Belleville, for defendant in error.

STONE, J. The plaintiff in error filed its bill in equity in the circuit court of St. Clair county to review the proceedings had before the Industrial Commission in the above entitled cause. The circuit court, after hearing, dismissed the complainant's bill for want of equity and confirmed the findings of the Industrial Commission.

Defendant in error, James Nicholas, was injured on February 12, 1918, in the course of his employment as a coal miner in the mine of plaintiff in error, by the premature explosion of powder which he was using in connection with his work. Plaintiff in error and Nicholas were working under the provisions of the Workmen's Compensation Act (Laws 1913, p. 335), and it is admitted that the injury arose out of and in the course of the employment of Nicholas, and that notice was given and claim made within the periods required by that act. Medical aid was furnished by plaintiff in error. It is admitted that the wages of Nicholas were $24 per week. He had no children under 16 years of age. The sum of $115.14 was paid subsequent to the injury and prior to the hearing before the arbitrator on the petition for compensation on the 29th of August, 1918. On hearing before the arbitrator an award was made as follows:

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18 $^{3}/_{7}$ weeks temporary total incapacity, at $12	$ 221 14
100 weeks loss of use of left eye, at $12	1,200 00
50 weeks 25% loss of use of left arm, at $12	600 00
30 weeks 15% loss of use of right arm, at $12	360 00
35 weeks disfigurement, at $12	420 00
	$2,801 14

On October 5, 1918, the plaintiff in error petitioned the Industrial Commission for a review of the award so made by the arbitrator, and on the same day secured from Nicholas, in consideration of the payment to him of $1,615.14 and the further paymentt of $204.20 for hospital, medical, and surgical expenses, a release from any and all claims and demands, damages, actions, or causes in action in law or in equity or any and all claims arising under the Workmen's Compensation Act on account of personal injuries resulting or to result from the accident in question. This release was acknowledged before a notary public after having been interpreted to Nicholas by Michael Kakazis. Upon the payment by the plaintiff in error to Nicholas of the consideration mentioned in the release, they agreed that the matters then pending before the Industrial Commission of the state of Illinois should be dismissed. They also stipulated the items that should constitute the basis of such settlement, as follows:

9 $^{4}/_{7}$ weeks temporary total disability	$ 115 14
Loss of eye and both arms partially	1,300 00
Disfigurement and medical services	404 20
Total	$1,819 34

Attached to this basis of settlement is the usual final receipt provided for, on a form of the Industrial Commission, for said sum of money, subject to review by the Industrial Commission, and signed by Nicholas.

The cause came on for a hearing before James A. Culp, one of the members of the Industrial Commission, on the above petition for review, on the 12th day of December, 1918. At this hearing for review the plaintiff in error offered in evidence the release signed by Nicholas on the 5th day of October, 1918, the stipulation to dismiss, and the receipt for final settlement, to which Nicholas by his attorney objected, on the ground that the final receipt amounts to a lump sum settlement, which had not as yet been presented to the Industrial Commission, and that the release and stipulation to dismiss, under the circumstances, were matters that could not be agreed upon without the consent of the Industrial Commission.

Some evidence was taken on review touching the facts and circumstances surrounding the execution of the above release and stipulation to dismiss, and the Industrial Commission made its finding and award as follows:

Disfigurement	$420 00
Temporary total disability, 9 $^{4}/_{7}$ weeks, at $12	116 00
Total loss of use of left eye, 100 weeks, at $12	1,200 00
50% oss of use of right eye, 50 weeks, at $12	600 00
25% loss of use of left arm, 50 weeks, at $12	600 00
15% loss of use of right arm, 30 weeks, at $12	360 00
Total award	$3,296 00

The commission further found that plaintiff in error had paid to Nicholas the sum of $115.14, which should be credited as a payment upon the foregoing installments, and reversed and set aside anything in the

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findings and award of the arbitrator inconsisent with the findings of the commission on review.

[1] It is contended that the Industrial Commission was without jurisdiction, after the filing of the stipulation of plaintiff in error and defendant in error, to dismiss the proceeding; that the effect of such agreement was to deprive the commission of any further jurisdiction.

Section 23 of the Workmen's Compensation Act is as follows:

"No employee, personal representative or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employee, personal representative or beneficiary hereunder except after approval by the Industrial Board."

Plaintiff in error contends that by making the agreement in question here Nicholas waived no legal rights. As we have seen the award of the arbitrator totaled $2,801.14, while the amount paid on the agreement totaled 1,819.34, so that it cannot be said, as a matter of law or fact, that in this settlement Nicholas did not waive any of his rights under the Compensation Act. Furthermore, plaintiff in error required that Nicholas sign a release for any and all claims, demands, damages, causes of action in law or equity, and all claims arising under the Compensation Act on account of his injuries. This release, if valid, includes a release of any right which the claimant had under the Compensation Act for a review within 18 months in case of recurrence of injuries. We are of the opinion that by the agreement, if valid, Nicholas would waive substantial rights accruing to him under the act, amounting to a waiver of provisions of the act in regard to amount of compensation, which such employee has no power to do.

It is urged, however, that one of the purposes of the act is to encourage settlements, and that the Industrial Commission has jurisdiction only where such settlements have not been made. While it is true that one of the purposes of the act is to encourage settlements of claims arising under it, yet such a settlement, in order to be within the contemplation of the act, bust be made in accordance with the terms and provisions of the act; and while it is likewise true that the Industrial Commission will not interfere with such a settlement when made, yet it does not follow that where the Indutrial Commission has taken jurisdiction such jurisdiction can be taken from it by the action of the parties unless such action be in conformity with the act. This, as we view it, was an attempted lump sum settlement on the part of the employer and the employee. Such a settlement must be petitioned for as provided in section 9 of the act, and must be approved by the Industrial Commission.. Schwarm v. Thomson & Sons Co., 281 Ill. 486, 118 N. E. 95; Goelitz Co. v. Industrial Board, 278 Ill. 164, 115 N. E. 875; Forschner & Co. v. Industrial Board, 278 Ill. 99, 115 N. E. 912. As was said by this court in the Goelitz Co. Case:

"The fundamental basis of workmen's compensation laws is that there is a large element of public interest in accidents occurring from modern industrial conditions, and that the economic loss caused by such accidents should not necessarily rest upon the public, but that the industry in which an accident occurred shall pay, in the first instance, for the accident. Harper on Workmen's Compensation, § 5. That lump sum payments, with proper safeguards, should be permitted is obvious, because on the part of the employer it may become necessary for him to terminate all his obligations to his injured workmen and others, and on the part of the employee and his dependents circumstances may arise when to deny such a lump sum settlement would result in great hardship and distress or entire loss of the compensation.. On the other hand, the state is concerned in preventing dissipation of the money paid and an

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early recourse to that charitable aid which systematic compensation aims to avoid."

[2] It is well settled in this state that an employer cannot relieve himself of liability under the Workmen's Compensation Act by a contract with his employee. Tribune Co. v. Industrial Com., 290 Ill. 402, 125 N. E. 351; Chicago Railways Co. v. Industrial Board, 276 Ill. 112, 114 N. E. 534; Wabash Railway Co. v. Industrial Com., 286 Ill. 194, 121 N. E. 569. What was said in these cases with reference to an employer relieving himself in toto from liability under the Workmen's Compensation Act applies with equal force here, where it is sought by the employer to relieve himself partially from said liability. It was said by this court in the Wabash Railway Co .Case, supra:

"Plaintiff in error was operating under the act, and any settlement or agreement made with an injured employee must be considered as having been made under the act, whether so expressly stated or not. It is contrary to the policy of the act to allow an employer, while choosing to come under its provisions by not filing an election in writing to the contrary, to relieve himself from liability under the act by private agreement or contract with the employee."

This language applies with equal force here, where the employer is seeking to limit its liability by settlement in the nature of the lump sum payment. This cannot be done without the approval of the Industrial Commission. Here there was no attempt to secure the approval of the commission, and such agreement could not deprive the commission of jurisdiction. Furthermore, the agreement was disaffirmed by Nicholas when the award made by the arbitrator came up before the commission. The act by section 9 provides the method by which lump sum settlements may be presented to the commission. There was no petition here to have a lump sum settlement made. No evidence was taken as to whether or not it was for the best interest of the applicant that such a settlement should be made. The commission therefore did not err in declining to recognize this settlement and in proceeding to a hearing of the application on review of the award from the arbitrator.

It is also objected that there is no competent evidence to sustain an award for disfigurement; that the scars caused by the powder burns on the neck of defendant in error were not discernible, as they are below the line of his collar; also that there is no competent evidence to sustain disfigurement of the hands. Examination of the record shows that one side of the face of the defendant in error is discolored by many dark blue or black powder marks, and that a noticeable scar was caused by powder burns under the left jaw. Applicant's hands were likewise scarred by powder burns. We are of the opinion that there is evidence in the record upon which to base the award made by the commission for disfigurement. Paragraph (c) of section 8 of the Workmen's Compensation Act provides for compensation for serious and permanent disfigurement of the hand, head, or face.

[3, 4] is urged that the Industrial Commission has awarded compensation for disfigurement and for the loss of use of the same member. The commission has no power to award compensation for disfigurement of a member and also for the loss of use of such member. Wells Bros. Co. v. Industrial Com., 285 Ill. 647, 121 N. E. 256. The record in this case, however, shows that an award was made for disfigurement of the face, while the award for a loss of use applies only to the eyes and arms. This award does not therefore contravene the rule.

[5-7] It is also contended that there is no competent evidence in the record to sustain the award for 50 per cent. loss of the use of the right eye, 25 per cent. loss of the use of the left arm, and 15 per cent. loss of the use of the right arm. An examination of the record discloses that

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while the evidence shows injuries to both arms and powder burns around the right eye, yet the evidence in the record upon which the commission apparently based its finding of the percentage of loss was the opinion of the applicant. It is the rule that a witness, though he be not qualified as an expert, may testify as to his state of health. He may tesify that he is suffering pain or as to his physical condition generally, but he is not allowed to give his opinion that an injury will be permanent. 1 Elliott on Evidence, § 679. As is said in McKelvey on Evidence, p. 218, note 3:

"As a rule, witnesses must state facts and not draw conclusions or give opinions. It is the duty of the jury or court to draw concluions from the evidence and form opinions upon the facts proved."

[8, 9] The determination of the per cent. of loss of use of the right eye and of the arms of the applicant was an issue of the ultimate fact before the arbitrator and commission. Peabody Coal Co. v. Industrial Com., 289 Ill. 449, 124 N. E. 566. It is competent to prove conditions, such as the comparative ability of the applicant to do certain things in the use of the injured member before and after the accident, as well as any other fact which would enable the commission to draw an inference as to the ultimate fact to be determined, but under the rule in this state neither an expert witness nor a law witness may take the place of the commission and declare his belief as to the ultimate fact. Peabody Coal Co. v. Industrial Com., supra; Keefe v. Armour & Co., 258 Ill. 28, 101 N. E. 252, Ann. Cas. 1914B, 188; Yarber v. Chicago & Alton Railway Co., 235 Ill. 589, 85 N. E. 928; Illinois Central Railroad Co. v. Smith, 208 Ill. 608, 70 N. E. 628. The opinion evidence of the applicant was not competent, and there being no other evidence in the record from which the commission could determine the per cent. of loss of the arms and right eye, such finding was error, and the circuit court should have remanded the cause to the commission for a further hearing on that subject.

[10, 11] It is objected by the plaintiff in error that the Industrial Commission erred in not giving it credit for more than $115.14 payments made. While plaintiff in error had no right to make a lump sum settlement, such as was attempted, it did have a right, under the law, to make payment of installments under the act as they accrued, and it is entitled to credit for such payments up to the time of the final determination of the award by the commission. Payments, however, which go beyond this, by means of an attempted lump sum settlement, are, as we have seen, illegal and unauthorized, and, while it might seem harsh to say that the defendant in error here should receive the benefit of such lump sum and yet not be bound thereby, it is a settled rule in this state that the court will not assist either party to an illegal transaction, but will leave them where they have chosen to place themselves. Arter v. Byington, 44 Ill. 468; Neustadt v. Hall, 58 Ill. 172; Harris v. Hatfield, 71 Ill. 298; Workingmen's Banking Co. v. Rautenberg, 103 Ill. 460, 42 Am. Rep. 26. As was said by this court in Goodrich v. Tenney, 144 Ill. 422, 33 N. E. 44, 19 L. R. A. 371, 36 Am. St. Rep. 459:

"It is not enough that the parties may have intended no wrong, or that the testimony produced in the case may have been true. It is the tendency of such contracts to the perversion of justice that renders them illegal."

So it may be said here. While this contract may have been entered into in perfect good faith, yet the purpose of the Compensation Act is, as we have said, that the economic loss caused by accidents should not be permitted to rest in any way upon the public, but that it should be absorbed by the industry in which the accident occurs, and, carrying out that purpose, all settlements of this character were by the law placed under the jurisdiction of the Industrial Commission. No lump sum settlement is authorized to be made in any other way, except under the

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jurisdiction of the commission, and any contract that makes such a settlement otherwise is an illegal contract, and this court will not aid in the enforcement thereof, but will leave the parties as it finds them.

[12] We do not here pass upon what should be done in case of a petition for a lump sum settlement, as no such petition is before us. If this settlement was made in good faith and under circumstances showing it to have been for the best interests of both parties, such facts may be shown before the Industrial Commission upon a petition for a lump sum settlement, should such be presented to that body, and would, of course, be matters proper to be considered by the commission in determining whether or not a lump sum settlement should be authorized and what the amount of the same would be.

For the reasons herein expressed the decree of the circuit court will be reversed and the cause remanded to that court, with direction to remand the case to the Industrial Commission for a correction of the award in harmony with the views herein expressed and for a further hearing as to the question of loss of use of the eye and arms if such is desired.

Reversed and remanded, with directions.

OHIO OIL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13254.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter 744.

3. MASTER AND SERVANT—COMPENSATION CLAIM JURISDICTIONAL.

Notice of the employee's injuries to the employer within 30 days and claim for compensation under the act within 6 months are jurisdictional, and an award of compensation cannot be sustained in the absence of evidence of compliance with such requirement of the act.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

4. MASTER AND SERVANT—COMPENSATION CLAIM HELD NOT WAIVED BY VOLUNTARY PAYMENTS.

Where certain payments to an injured employee were not made by his employer under the Compensation Act, but were voluntarily made without reference to the act, the employee's widow is not entitled to maintain her proceeding for compensation under section 24, on any theory of waiver of notice of injury and written claim for compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

5. MASTER AND SERVANT—COMPENSATION CLAIM HELD TOO LATE.

Where an employee was injured, and returned to work for a time, his widow was not entitled, under Workmen's Compensation Act, § 8, par. (d), to 18 months from the time of returning to work in which to file notice of claim with the Industrial Board, being required to do so within 6 months.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Error to Circuit Court, Crawford County; Charles H. Miller, Judge.

Proceeding for compensation under the Workmen's Compensation Act by Cora Brown, administratrix, for the death of William G. Brown,

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her husband, the employee, opposed by the Ohio Oil Company, the employer. Compensation was awarded by the Industrial Commission, the award confirmed by the circuit court, and the employer brings error. Judgment of the circuit court reversed, and record of the Industrial Commission quashed.

M. N. Poe and McCarty & Arnold, of Robinson, for plaintiff in error.
Newlin, Parker & Newlin, of Robinson, for defendant in error.

DUNN, J. This writ of error to the circuit court of Crawford county was allowed for the purpose of reviewing a judgment of that court, which confirmed an award of compensation against the Ohio Oil Company by the Industrial Commission in favor of Cora Brown, administratrix of the estate of William G. Brown, for the death of the intestate, who was her husband. The points argued for reversal are that no notice was given to the company within 30 days after the accident, that no claim for compensation was made within 6 months, and that there is no competent evidence that the deceased was injured in the course of his employment, or that his death resulted from an injury so received.

The deceased was in the employ of the Ohio Oil company, which was engaged in the production of oil from land leased for that purpose in Crawford county, as a pumper. It is claimed that he was injured by being struck in the face by a piece of wood which he was cutting in the course of his employment for the purpose of repairing shackle rods, and that he died from a cancer resulting from this injury. On August 29, 1916, after dinner, he went back to his work, and in a half or three-quarters of an hour his wife went to where he was at work. She testified that she had seen him cutting sticks, and when she came to the place where he was working she found him leaning against the rod line in a dazed condition, his face and hands white, the stick of wood which he had been chopping lying on the ground, and his right cheek scraped under the eye, though the kin was not broken. He remained dazed for a second or more, when he came to, and she asked him what was the matter. She was not permitted to give his answer. No effect on the eye appeared until the next day, when it darakened ,and remained dark for a few days. He went right on with his work. This happened on Wednesday. On Saturday Mrs. Brown went with her husband to the company's tool house, and told John Raglin, the field boss under whom he was working, that he had been injured. The only evidence of the injury or the notice was this testimony of Mrs. Brown, which was objected to as incompetent. In December the eye and face began to swell and the skin was red. The swelling grew worse gradually, but Brown continued at his work until March 22, 1917, when he went to the hospital at Robinson. He was found to have a cancer on the right side of his face, for which he was operated on the following day, and afterward he received treatment there. He returned to work for the company on August 13, 1917, and worked until October 22, when his health finally broke down, and he quit. The plaintiff in error paid him from December 18, 1917, until March 27, 1918, at the rate of $10 per week. It also paid the hospital bill Until October 1, 1917, amounting to $228.50. Brown died on April 2, 1918, from the effect of the cancer. The opinion of two physicians who treated him, given in answer to a question based on the hypothesis that Brown received a blow on the cheek, was that the cancer resulted from the blow.

No claim for compensation was made within 6 months after the accident. In March, 1917, Brown told Lawrence Wagner, farm foreman of the plaintiff in error, what caused the trouble to his eye, and Wagner sent him to Charles Baker, distric foreman, who sent him to the hospital. Some time after the operation, J. T. Lindsay, an attorney representing

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Mr. and Mrs. Brown, talked with W. W. McDonald, a superintendent of the Ohio Oil Company, about Brown's financial condition, and asked him to pay Brown compensation under the Compensation Act. Afterward McDonald told Lindsay that he had taken the matter up with the company and that the company refused to do anything because it was not liable on account of not having been notified, and later that the company said the only thing to do was to institute proceedings before the board. Afterward McDonald came back to Lindsay's office at a time when Mrs. Brown was there. Lindsay told him something of Brown's financial condition, that they were almost destitute, and McDonald said, "Well, I just came over to see about that; Mr. Kerr and I have talked it over; we thought we would do something for him." He did not say how much they were going to pay, or why; but he held out all the time that they were not liable. No contract or settlement was agreed on, and no further reference was made to the Compensation Act. McDonald did not agree to pay any definite amount or for any specific time, but weekly payments of $10 (which exceeded half of Brown's wages, which were $80 a month), were made to him after December 28, 1917, during his lifetime, by the company's cashier, who took receipts for the payments without any reference to the account on which they were paid or to the Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i).

[1, 2] The only evidence of the giving of notice to the company within 30 days after the happening of the accident is the testimony of Mrs. Brown that she heard her husband tell the field boss that he had been injured, and her competency as a witness is objected to because of her relation to the deceased. At common law husband and wife were incompetent to testify for or against one another, and they were also incompetent to testify either during the marriage relation or after its termination by death or divorce, even in suits to which neither was a party, as to any matter knowledge of which was obtained in consequence of the marriage relation. Monakhan v. Green, 265 Ill. 233, 106 N. E. 792. The rule has been modified by sections 1 and 5 of the act in regard to evidence (Hurd's Rev. St. 1917, c. 51); but the exceptions do not apply to any admissions or conversations between husband and wife, or by either with third persons, except in suits between the husband and wife. The rule is founded in public policy, and under this statute the wife has been held incompetent to testify to a conversation of her deceased husband in her presence. Reeves v. Herr, 59 Ill. 81. Mrs. Brown was not a competent witness to the conversation between her husband and the field boss.

[3, 4] The notice within 30 days and the claim for compensation within 6 months are jurisdictional, and an award cannot be sustained, in the absence of evidence of a compliance with these requirements of the statute. Haiselden v. Industrial Board, 275 Ill. 114, 113 N. E. 877; Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496. On June 25, 1918, Mrs. Brown served upon the company a written claim for compensation. This was within 6 months after the last of the weekly payments made to Brown by the company, and defendant in error claims that these payments were made under the provisions of the act, and she is therefore entitled to maintain this proceeding under the last clause of section 24. From the evidence in regard to these payments, which has already been set forth, it is manifest that they were not made under the provisions of the act, but were voluntarily made without reference to those provisions; the plaintiff in error denying its liability and the administratrix and her attorney knowing that it denied all liability.

The case is different from that of Tribune Co. v. Industrial Com., 290 Ill. 402, 125 N. E. 351. In that case, as in this case, no claim for compensation was made within 6 months of the accident, though within

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that time payments of compensation were made while none were made in this case In that case a contract of settlement was made, which was approved by the Industrial Commission under the Workmen's Compensation Act. The agreement of settlement recited that jurisdiction had been lost under the Workmen's Compensation Act, and that the settlement was purely voluntary on the part of the employer, but it was held, following Wabash Railway Co. v. Industrial Com., 286 Ill. 194, 121 N. E. 569, that any settlement or agreement made between an employer operating under the act and an injured employee must be considered as having been made under the act, and is a submission to the jurisdiction of the Industrial Commission, and a waiver as to any question of time limitation then existing, even though the agreement stated to the contrary.

In the present case there was no agreement whatever. The employer, as the claimant's attorney knew, denied any liability, and made no attempt to settle its liability, or any claim made against it, but suggested that the only thing to do was to institute proceedings before the Industrial Commission. Later the employer, through some of its officers, determined not to settle with the employee, but to "do something for him." No contract was made to pay anything—no promise of any amount or for any time. There was nothing for the Industrial Commission to approve or disapprove, and since there was no agreement there was no waiver. The attorney testified that they did not see any use of filing the claim at that time after they were helping him out, and there would have been no use, for the claim was already barred by the lapse of time.

[5] P aragraph (d) of section 8 of the Compensation Act provides:

"In the event the employee returns to the employment of the employer in whose service he was injured, the employee shall not be barred from asserting a claim for compensation under this act. Provided, notice of such claim is filed with the Industrial Board within eighteen months after he returned to such employment, and the said board shall immediately send to the employer, by registered mail, a copy of such notice."

The claim is made that under this provision Brown and his administratrix were entitled to file a claim for compensation at any time within 18 months after August 13, 1917, the date when Brown returned to work after his absence at the hospital. That provision does not apply to this case. Its intention is to extend, for 18 months after his return to work, the right of an employee to maintain an existing claim, and not to grant a right. If an employee, who has been injured and has a right to compensation returns to work for the same employer, the law gives him 18 months in which to file his claim with the Industrial Commission, but does not create in him a new right, which he did not have at the time he returned.

The judgment of the circuit court is reversed, and the record of the Industrial Commission is quashed.

Judgment reversed.

ORIENTAL LAUNDRY CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13152.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 676.

1. MASTER AND SERVANT—CERTIORARI TO REVIEW AWARD OF COMPENSATION BEGUN BY PRÆCIPE.

Within Workmen's Compensation Act, § 19 (f), requiring suit by certiorari to be commenced within 20 days of the receipt of notice of the

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decision of the board, a suit for writ of certiorari was begun by filing the præcipe for the writ.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

2. MASTER AND SERVANT — COMPENSATION ACT CONSTRUED ACCORDING TO INTENTION.

The intention of the Legislature is to be gathered, in construing the Workmen's Compensation Act, from the necessity or reason of the act, and the meaning of the words, enlarged or restricted, according to such intention as ascertained from the consideration of the whole act.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

3. MASTER AND SERVANT—COMPENSATION ACT HELD TO AUTHORIZE ISSUANCE OF ALIAS WRITS BY REVIEWING COURT.

Where the employer filed in time his præcipe for writ of certiorari and scire facias, as required by the Workmen's Compensation Act, the court can thereafter issue alias writs to replace those lost before service on the commission or the employee, though there is no express provision in the statute authorizing alias writs.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

4. MASTER AND SERVANT — COMPENSATION ACT BEFORE AMENDMENT EXCLUDED NONHAZARDOUS EMPLOYMENT, UNLESS EMPLOYER ALSO ENGAGED IN HAZARDOUS BUSINESS FILED NOTICE OF ELECTION.

Before Workmen's Compensation Act, § 3, was amended in 1917 to bring employers in extrahazardous employments automatically under the act without the filing of a notice, an employer operating a steam laundry, which was extrahazardous under the terms of the act as to employees working with the machinery, was not within the terms of the act as to an employee who only solicited orders outside the laundry, unless the employer had given notice of intention to come within the act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding for compensation by Jeanette E. Curtis, employee, against the Oriental Laundry Company, employer. An award of compensation by the Industrial Commission was confirmed by the Circuit Court, and the employer brings error. Reversed.

Ralph F. Potter and Earl D. Hostetter, both of Chicago, for plaintiff in error.

Gustav E. Beerly, of Chicago, and Ellis S. Chesbrough, for defendant in error.

CARTER, J. Defendant in error, Jeanette E. Curtis, made application for compensation for an injury sustained by a fall on an icy sidewalk in Chicago while soliciting laundry business for plaintiff in error. On a hearing under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i) the arbitrator found for the plaintiff in error. On review before the Industrial Commission some additional testimony was heard, and the commission found that the applicant's injury arose out of and in the course of the employment, and that she was entitled to compensation, specifying the amount due her, which award the circuit court confirmed on review, and the case is now here by writ of error.

Plaintiff in error's laundry was operated by and used power-driven machinery. It does not appear that the company had filed with the In-

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dustrial Commission any notice of its application to come within the act. Jeanette E. Curtis, at the time of her injury and prior thereto, was employed by plaintiff in error in soliciting laundry orders from families at a salary of $12 a week. She mailed in the orders as she received them, and called in person at the laundry office each Tuesday night for her salary. On the day of her injury, December 27. 1916, she was walking along Huron street, between Central and Pine avenues, to solicit orders in an apartment building, when she fell to the icy pavement and broke her hip bone, from which injury she was confined to her bed six weeks, and for two weeks longer was obliged to be lifted from the bed to a chair.

Counsel for defendant in error have raised a question of procedure, which should be first determined. The decision on review by the Industrial Commission was dated June 20, 1918. The attorney here of record filed an affidavit in the circuit court May 13, 1919, stating that the files in said cause was turned over to him by the former attorney for plaintiff in error, and affiant had made diligent search in said files for the writ of certiorari and the writ of scire facias issued by the clerk at the time the præcipe was filed on July 9, 1918, but the same could not be located; that they had not been delivered to the sheriff, and had been lost. The same day an order was entered in the circuit court, directing the clerk to issue an alias writ of certiorari and scire facias, and to place the cause at the foot of the workmen's compensation calendar. The alias writ of scire facias to summon the defendant in error was issued May 20, 1919. On June 13, 1919, a special appearance was entered by defendant in error for the sole purpose, of contesting the jurisdiction of the circuit court as to her, and moving, by the same motion, to quash the alias writ of scire facias and the alleged service.

It is argued by counsel for defendant in error that, as this is purely a statutory proceeding, no process can issue, except as provided for in the act; that there is no provision for an alias writ of scire facias or alias writ of certiorari in the act; that it was the intention of the Workmen's Compensation Act that all the process should be served before the return day; and that, as these alias writs were void, the plaintiff in error is without remedy in the procedure pursued. Paragraph (f) of section 19 of the Workmen's Compensation Act (section 144) provides, in part, as follows:

"The circuit court of the county where any of the parties defendant may be found shall by writ of certiorari to the Industrial Board have power to review all questions of law presented by such record. Such writ shall be issued by the clerk of such court upon præcipe. Service upon any member of the Industrial Board or the secretary thereof shall be service on the board, and service upon other parties in interest shall be by scire facias, or service may be made upon said board and other parties in interest by mailing notice of the commencement of the proceedings and the return day of the writ to the office of said board and the last known place of residence of the other parties in interest at least ten days before the return day of said writ; or any party in interest may commence a suit in chancery. * * * Such suit by writ of certiorari or in chancery shall be commenced within twenty days of the receipt of notice of the decision of the board." Hurd's Stat. 1917, p. 1461.

That section also provides for the giving of a bond by the party bringing the suit. A præcipe and bond were filed in the time required by the statute. It will be noted from the quoted provision of the statute that the writ is to be issued upon the filing of a præcipe, and that the suit must be commenced within 20 days of the receipt of the notice of the board's decision. It is true that there is no provision for the issuance of alias writs. All proceedings under the Workmen's Compensation Act are statutory. People v. McGoorty, 270 Ill. 610, 110 N. E. 791. The question

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as to the construction of the statute on this point has not been directly decided by this court. In Fruit v. Industrial Board, 284 Ill. 154, 119 N. E. 931, the question was indirectly under consideration, and the fair inference from the decision is that an alias writ would be authorized under the statute, for it was there held that where the original præcipe was filed within the statutory period, if service was not had according to statute this "necessitated the issuance of the alias writ."

[1] It is argued by counsel for defendant in error that, as an alias writ is not mentioned in the Workmen's Compensation Act, under the reasoning of this court in construing the Attachment Act an alias writ here could not be held authorized. See Pack, Woods & Co. v. Savings Bank, 172 Ill. 192, 50 N. E. 326. and Keeley Brewing Co. v. Carr, 198 Ill. 492, 64 N. E. 1030. In Schroeder v. Merchants' & Mechanics' Ins. Co., 104 Ill. 71, this court said (page 74):

"What is the commencement of a suit? It is not claimed that it is the service of process on the defendant. It is believed that no case can be found that holds the suit is not commenced until service, or appearance of the defendant. We may therefore conclude that jurisdiction of the person of the defendant is not essential to the commencement of a suit. But it is apparent that a suit is not commenced until the court has in some manner acquired jurisdiction of something in relation to the controversy. It must therefore be over the person of the plaintiff, or the subject matter, or both. The court acquires jurisdiction of the plaintiff when he applies for its power and assistance to compel the defendant to render him his rights under the law; but this aid must be sought according to prescribed forms, and under our practice that form requires that he file with the clerk of the court a præcipe for the process he desires. * * * The court clearly has jurisdiction of the plaintiff when he thus invokes its aid. When he thus submits his person to the court, he, by asking its aid, gives the court jurisdiction over the subject matter in controversy."

Attachment proceedings, such as are referred to in the above cases cited by counsel for defendant in error, are instituted upon the filing of an affidavit and bond, instead of a præcipe, and it is the facts set forth in the affidavit at the time of the filing that are grounds for the issuance of the attachment. A writ of attachment performs a double office. It is a summons and an execution, upon which the property of the defendant is seized before judgment. Keeley Brewing Co. v. Carr, supra. The distinction in the grounds for jurisdiction, as illustrated in these decisions and that of the Schroeder Case, supra, is apparent as to the subject-matter and the plaintiff. That there must be jurisdiction is necessary, but the tendency in the workmen's compensation cases in following out the spirit of the act has been to permit the hearing and adjudication of claims with as little delay and formality as is consistent with orderly procedure. The filing of the præcipe should be held to be the beginning of this suit, thus giving the circuit court jurisdiction to review the proceedings of the Industrial Commission. Smith-Lohr Coal Co, v. Industrial Board, 279 Ill. 88, 116 N. E. 656.

[2, 3] The intention of the Legislature in construing this statute is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to such intention as ascertained from a consideration of the whole act. Louisville & Nashville Railroad Co. v. Industrial Board, 282 Ill. 136, 118 N. E. 483. To hold that the circuit court had no authority to enter an order directing alias writs of certiorari and scire facias when there was a præcipe on file, and in view of the proof of loss of the previous papers would, in our judgment, be contrary to the intention of the Legislature and the purposes and wording of the act. The conclusion follows that the

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circuit court did not err in holding that it had jurisdiction under the alias writ.

[4] Counsel for plaintiff in error do not deny that in the business of the Oriental Laundry Company power-driven machinery was used. but contended that, as it had not filed with the Industrial Commission any notice of its election to provide and pay compensation under the act, and as the applicant's injury had no connection with the operation of the machinery, her occupation could not be regarded as extrahazardous under section 3 of the act (section 128). The injury occurred in 1916, and the application for compensation was filed in January, 1917, before the Workmen's Compensation Act was amended to make employers engaged in extrahazardous occupations come automatically under the act without the filing of a notice to that effect. Under such circumstances the reasoning in Marshall v. City of Pekin, 276 Ill. 187, 190, 114 N. E. 497, 499, is applicable here, where it is said:

"An employer who is engaged in an extrahazardous occupation, and who has made no election to come under the Workmen's Compensation Act, cannot be compelled to pay compensation under said act to any employee injured in an occupation not deemed extrahazardous under said act simply because such employer is also engaged in an extrahazardous employment and in which said employee is not engaged."

This court also said in Brennan v. Industrial Com., 289 Ill. 49, on page 51, 124 N. E. 297:

"Because some other employees may have been engaged in some other part of the work that was extrahazardous would not change the character of the defendant in error's employment or bring him within the provisions of the Workmen's Compensation Act."

See, also, to the same effect, Compton v. Industrial Com., 288 Ill. 41, 122 N. E. 872, and Mattoon Water Co. v. Industrial Com., 291 Ill. 487, 126 N. E. 168.

Under the reasoning in those cases and the authorities there cited, the employer not having elected to pay compensation to all his employees, and as the law existing at the time of the accident and application here in question did not bring the employer automatically within the Compensation Act as to such employees, the Industrial Board is without jurisdiction to award compensation to an employee, such as the applicant, whose duties were entirely separate and apart from any work about the laundry or the power-driven machinery operated therein. The evidence shows clearly that the only time the applicant ever came to the laundry was when she went each Tuesday to the office to receive her pay for the orders she had secured. There is nothing in the record to indicate that on such visits she had anything to do with the power-driven machinery or was expected to go near it.

We are not intending to intimate by anything said here that under the present law, which brings employers engaged in extrahazardous occupations automatically under the act, employees engaged in an occupation entirely independent and separate from the extrahazardous employment would come within the act. That question is not involved here and we do not in any way consider or pass upon it, that being unnecessary, as at the time of this accident the act had not been amended, so as to bring employers engaged in extrahazardous occupations automatically under it.

This conclusion renders it unnecessary for us to discuss or decide whether the injury did or did not arise out of and in the course of the employment, as argued by counsel in their briefs.

As the Industrial Commission was without jurisdiction to award compensation to the applicant, the judgment of the circuit court is reversed, and the finding of the commission set aside.

Judgment reversed.

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SLAGO COAL CO. v. INDUSTRIAL COMMISSION ET AL.

(No. 13261.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter. 751.

1. MASTER AND SERVANT—COMPENSATION FOR TEMPORARY PARTIAL INCAPACITY FOR WORK AND FOR PERMANENT PARTIAL LOSS OF MEMBER PROPER.

An employee may recover under Workmen's Compensation Act, § 8, par. (d), for temporary partial incapacity for work, and at the same time recover, under paragraph (e), cl. 17, for permanent partial loss of use of a member, where the partial incapacity arises out of injuries other than those received by the member for which the award for permanent partial loss of use is allowed.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

2. MASTER AND SERVANT — AWARD HELD IMPROPER AS GIVING DOUBLE COMPENSATION.

Where there was no evidence that an employee's temporary partial loss of capacity for work was due to any other injury than the one for which compensation was allowed for permanent partial loss of the use of the right arm, an award for the temporary partial loss of capacity for work, as well as for permanent partial loss of the use of the arm, amounted to double compensation, which the Workmen's Compensation Act does not authorize.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

Error to Circuit Court, Williamson County; D. T. Hartwell, Judge.

Proceeding for compensation under the Workmen's Compensation Act by Frank Kelley, the employee, opposed by the Slago Coal Company, the employer. Compensation was awarded by the Industrial Commission, the award affirmed by the circuit court, and the employer brings error. Judgment modified and affirmed.

Denison & Spiller, of Marion (R. H. Davis, of St. Louis, Mo., of counsel), for plaintiff in error.

STONE, J. Defendant in error was injured while engaged in the occupation of mule driver in plaintiff in error's mine. The defendant in error, according to his testimony, was knocked unconscious and his right eye, shoulder, and chest were hurt. There was a gash or cut over the left eye. His eyesight was not injured. The cut over the eye left a bluish scar three-quarters of an inch long. The findings and the award of the arbitrator were affirmed by the Indutrial Commission and were as follows: The sum of $12 a week for a period of $3^4/_7$ weeks for temporary total incapacity; the sum of $7.50 a week for a period of $8^3/_7$ weeks, under paragraph (d) of section 8 of the Compensation Act (Hurd's Rev. St. 1917, c. 48, § 133), for partial incapacity; the sum of $12 per week for 4 weeks for disfigurement to the face; and the sum of $12 per week for a period of 50 weeks for a 25 per cent.loss of the use of the right arm. The circuit court of Williamson county affirmed the award of the Industrial Commission on review, and the cause comes here on writ of error.

The only contention made by plaintiff in error is that the award is excessive; it being contended that the commission was not authorized,

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under paragraph (d) of section 8 of the Compensation Act, to make an award for partial incapacity when a further award was given under paragraph (e) of said section for a specific loss of 25 per cent. of the use of the right arm, and that therefore the award of $7.50 per week for a period of 8⁸/₇ weeks was unauthorized.

Paragraph (d) of section 8 of the act authorizes an award where the employee, by reason of injuries sustained, becomes partially incapacitated, in all cases except those covered by the specific schedule as set forth in paragraph (e) of said section. Clause 17 of paragraph (e) of said section authorizes an award for a permanent partial loss of use of a member of the body or the loss of sight of an eye, and plaintiff in error contends that an award of $7.50 per week for 8⁸/₇ weeks for partial incapacity amounts to double payment for said period; it being argued that the partial incapacity in this case, according to the evidence of the defendant in error, arose solely out of the injury to his shoulder, and that the permanent partial loss of use of the right arm arose out of the same injury.

[1, 2] While an employee may recover for temporary partial incapacity for work, and at the same time recover for permanent partial loss of use of a member, where the partial incapacity arises out of injuries other than those received by the member for which the award for permanent partial loss of use is allowed, yet we are of the opinion that in this case the award was not authorized, for the reason that there is no evidence in the record which tends to show that the temporary partial loss of capacity for work was due to any other injury than the one for which compensation was allowed for permanent partial loss of use of the right arm. The record shows that the defendant in error received a cut over the eye, bruises on the chest, and an injury to the right shoulder. He was allowed for temporary total disability. He was also allowed for disfigurement caused by the cut over his eye. There was no injury to the arm according to the testimony of the defendant in error, and it follows that the permanent partial loss of use of that member must have arisen by reason of the injury to the right shoulder, so that the temporary partial incapacity for work for which the commission awarded the sum of $7.50 a week for a period of 8⁸/₇ weeks must have arisen out of the same injury which caused the permanent partial loss of use of the right arm. There is nothing in the record from which any other conclusion can be drawn. This award, therefore, amounted to double compensation for a period of 8⁸/₇ weeks, which the law does not authorize.

The judgment of the circuit court will therefore be modified, and the award corrected, by striking out the allowance of $7.50 per week for the period of 8⁸/₇ weeks, and, as modified, the judgment will be affirmed.

Judgment modified and affirmed.

HAFER WASHED COAL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13260.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 752.

1. MASTER AND SERVANT—COMPENSATION AWARD HELD NOT JUSTIFIED BY EVIDENCE.

The Industrial Commission is not justified in finding for one party to a compensation proceeding because there is some evidence which, standing undisputed, would justify the finding, nor should it base its

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finding on testimony which all the facts and circumstances show to be untrue.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

2. MASTER AND SERVANT—COMPENSATION AWARD BASED ON CONJECTURE CANNOT STAND.

If in the opinion of the Industrial Commission there was sufficient evidence to justify an award under the Workmen's Compensation Act the Supreme Court is not authorized to set aside the award because it would have reached a different conclusion from the evidence, but a finding based on mere conjecture cannot stand.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

3. MASTER AND SERVANT—COMPENSATION AWARD WITHOUT REQUIRING SUBMISSION TO EXAMINATION BY PHYSICIANS HELD ERRONEOUS.

In view of the circumstances, Industrial Commission *held* to have erred in proceeding to award compensation without requiring the injured employee to submit to examination by physicians, selected by the employer in accordance with the provisions of Workmen's Compensation Act, § 12, or physician selected by the commission in accordance with section 19.

(For other cases, see Master and Servant, Dec. Dig. § 399.)

Error to Circuit Court, Williamson County; D. T. Hartwell, Judge.

Proceedings for compensation under the Workmen's Compensation Act by Wiley Yates, the employee, opposed by the Hafer Washed Coal Company, the employer. Compensation was awarded by the Industrial Commission, the award affirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

Denison & Spiller, of Marion (R. H. Davis, of St. Louis, Mo., of counsel), for plaintiff in error.

A. W. Kerr, of Springfield and George R. Stone, of Marion, for defendant in error.

THOMPSON, J. This writ of error is prosecuted by leave of court to review the judgment of the circuit court of Williamson county confirming an award of the Industrial Commission awarding compensation to Wiley Yates, defendant in error, for a period of 12 days' temporary total incapacity and for a period of 50 weeks for the loss of 25 per cent. of the vision of both eyes, the injuries being sustained while defendant in error was an employee of the Hafer Washed Coal Company, plaintiff in error.

Defendant in error was employed to repair gasoline engines used in the mines of plaintiff in error. About 4 o'clock on the morning of September 10, 1918, defendant in error went to the oil house of plaintiff in error to draw some gasoline. He hung his miner's lamp on a staple about five feet from the barrel of gasoline, and when he had drawn about a gallon the fumes arising from the gasoline caught fire. Defendant in error ran out of the oil house. His shirt sleeves were burned, and he was scorched about the arms and face. He makes some extravagant statements to the effect that his hands, arms, and face were so badly burned that all the skin came off, and that his eyes were so severely burned that now he has only 50 per cent. of his normal vision. The undisputed facts appearing in the record from his testimony and that of other witnesses are that he waited around the mine until after 7 o'clock; that he helped put out the fire, and then washed up and changed clothes;

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that he did not go to the doctor until some time later that morning; that the doctor treated his hands and arms that morning and again 4 or 5 days later; that there are now no scars from the burns anywhere on his body; that he has never consulted any physician regarding his eyes; that he has had no examination by an eye specialist; that he returned to work September 26, and has been paid his regular wages, and has lost no more time as a result of the injury. The employees who were about the mine on the morning of the accident testified that he made no complaint of injury to his eyes, and that they saw nothing wrong with his face or eyes. Dr. B. F. Crain, the physician selected by defendant in error to treat his injuries, testified that defendant in error made no complaint to him regarding injuries to his face and eyes, and that he made no examination whatever of his eyes. He further testified that the injuries to his hands and arms were slight scorches of the skin, with the possible exception of a few spots where the burns went through the skin.

[1] Over the objection of plaintiff in error defendant in error was permitted to express the opinion that he had suffered a 50 per cent. loss of the vision of both eyes. This court is not permitted to review the evidence for the purpose of determining where the preponderance lies, but we are authorized to consider the evidence to determine whether there is any evidence in the record to sustain the finding of the commission. It is the duty of the commission to hear and weigh the evidence and to make its finding for that party in whose favor the evidence preponderates. It is not justified in finding for one party because there is some evidence in the record which, standing undisputed, would justify that finding, nor should it base its finding on testimony which all the facts and circumstances in the record show to be untrue. Exaggerated statements and groundless assertions that have no foundation in fact are not the character of evidence which the law recognizes as worthy to support any legal finding. It was error to permit defendant in error to express an opinion regarding the per cent of his loss of vision.

[2] Defendant further testified that he could not see as well after the accident as he could before; that he could not read by electric light for any length of time because the print became blurred; that if he looked at an object steadily for a time it disappeared; that the wind made his eyes water; and that the light and heat hurt his eyes. This evidence was competent to be considered by the commission in determining that defendant in error had suffered an injury to his eyes, and, if in the opinion of the commission there was sufficient evidence to justify an award, this court is not authorized to set aside that award because it would have reached a different conclusion from the evidence. On the other hand, the finding of the commission cannot be based on mere conjecture, but must have some substantial foundation in the evidence.

[3] It is further urged that the commission erred in not requiring the defendant in error to submit to an examination by an eye specialist. Section 12 of the Workmen's' Compensation Act provides that an employee entitled to receive disability payments shall submit himself for examination to a duly qualified medical practitioner selected by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury and at intervals after the first examination, "for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this act." Hurd's Stat. 1917, p. 1457. We think, on principle, the purpose of the examination is a legitimate and proper one. In the first place, the employer is entitled to obtain from a man of skill an opinion as to the workman's condition for the purpose of determining whether or not he will settle the claim without litigation, and, in the second place,

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if a settlement cannot be reached he is entitled to this information so that he may present it to the arbitrator or Industrial Commission for its consideration in determining the amount of compensation to which the employee is entitled. When the case was called for hearing before the Industrial Commission plaintiff in error requested that this examination be made at its expense by either of two eye specialists suggested by it or by any qualified physician to be selected by the commission. It appears from the statement of attorneys for plaintiff in error to the commission that some two months before the hearing they had requested defendant in error to submit to an examination by Dr. J. M. Keller, and had advanced to him money necessary to cover expenses that would be occasioned by his trip to the office of the physician. The request of the employer for a physical examination of the employee should be made at a reasonable time, and ordinarily before the case is called for a hearing before the arbitrator or the Industrial Commission. Under the circumstances shown in this record we think it was error for the commission to proceed without requiring defendant in error to submit to an examination by physicians selected by plaintiff in error in accordance with the provisions of section 12 of the act or a physician selected by the commission in accordance with section 19 of the act.

The judgment of the circuit court is reversed, and the cause is remanded to the circuit court of Williamson county, with directions to remand the cause to the Industrial Commission for further proceedings in accordance with the views herein expressed.

Reversed and remanded, with directions.

HENRY PRATT CO. v. INDUSTRIAL COMMISSION et al. (No. 13252.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter 754.

1. MASTER AND SERVANT—FATHER EARNING STEADY INCOME HELD NOT "PARTIALLY DEPENDENT" ON SON, WITHIN COMPENSATION ACT.

A father of seven children *held* not partially dependent, under Workmen's Compensation Act, on a son who had contributed some of his earnings to pay for home and a fixed amount for board, where the father earned $18 a week, of which amount he gave his wife $10.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—PARTIAL DEPENDENCY, WITHIN COMPENSATION ACT NOT DEPENDENT ON ABSENCE OF NECESSARIES OF LIFE.

Partial dependency may exist, though evidence shows claimant could have subsisted without contributions of deceased employee, and it is not necessary to show that claimant would have been without the necessaries of life, or without other means of support, as the test is whether the contributions were relied on by the dependent for a living, and existence of dependency is largely one of fact.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

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3. MASTER AND SERVANT—PARTIAL DEPENDENCY, WITHIN COMPENSATION ACT, HELD QUESTION OF FACT.

Whether a mother, who received $10 a week from her husband, was partially dependent on deceased son, under Workmen's Compensation Act, the son contributing fixed sum for board and aiding in paying for home, *held* a question of fact.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

4. MASTER AND SERVANT—FINDING OF PARTIAL DEPENDENCY CONCLUSIVE.

Finding of Industrial Commission that mother of son, killed in course of his employment, was partially dependent on him for support, will not be disturbed on writ of error to circuit court, confirming award of commission.

(For other cases, see Master and servant, Dec. Dig. § 418[6].)

5. MASTER AND SERVANT — INDUSTRIAL COMMISSION MUST DETERMINE PERSONS ENTITLED TO COMPENSATION.

Under Workmen's Compensation Act, where there is no voluntary payment on part of employer, and the Industrial Commission must determine the compensation for death of employee, it is the further duty of the commission to determine the person or persons entitled to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Error to Circuit Court, Cook County. O. M. Torrison, Judge.

Proceeding by Henry Olson and another under the Workmen's CompensationAct to recover for death of Hugo Olson, a son, opposed by the Henry Pratt Company, employer From a judgment of the circuit court, confirming award of Industrial Commission to applicants, the employer brings error. Modified and affirmed.

Frank M. Cox and Albert N. Powell, both of Chicago, for plaintiff in error.

Edward J. Kelley, of Chicago, for defendants in error.

THOMPSON, J. This writ of error is prosecuted by leave of court to review the judgment of the circuit court of Cook county confirming an award of the Industrial Commission awarding compensation to Henry Olson and Ellen Olson, parents of Hugo Olson, an employee of plaintiff in error, who died from an accidental injury arising out of and in the course of his employment. Compensation was fixed at $1,650, payable in installments, in accordance with the provisions of paragraph (c) of section 7 of the Compensation Act (Hurd's Rev. St. 1917, c. 48, § 132). The only question presented is whether the applicants, or either of them, were dependent upon the earnings of deceased within the meaning of the Compensation Act as amended and in force May 31, 1917.

[1] From the testimony of the applicants, the only witnesses before the arbitrator, it appears that the family of Henry Olson consisted of himself, his wife and seven children. He was 54 years old, his wife was 59 years old, and deceased was 29 years old, at the time of his death. The two oldest daughters were married, and, while they lived much of the time with their parents, they were supported by their husbands. The other four children—Emma, 25; Teckla, 24; Lydia, 22; and Walter, 19—were single and lived with their parents. The home cost $2,500 and was paid for in installments of $20 a month. The last installment was paid

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a year or more before the death of Hugo. He contributed toward the payments on the home, furnished materials for painting, papering, and repairing the home, and did the work at odd times. He paid part of the taxes and the coal bills, and paid to his mother $7 a week for board and room. He furnished her spending money and gave here funds with which to buy clothes. It does not appear from the record whether any of the other children paid board or otherwise contributed toward the support of the home. The father was steadily employed at $18 a week. Of this amount he gave his wife $10, which, with the contributions from the children, constituted the fund from which Mrs. Olson paid all the household expenses.

[2] Partial dependency may exist, even though the evidence shows the claimant could have subsisted without the contributions of the deceased employee. It is not necessary to show that the claimant would have been without the necessities of life, nor is it necessary to show that the dependent was without other means of support. Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245; Havey v. Erie Railroad Co., 87 N. J. Law, 444, 95 Atl. 124; Kenney v. City of Boston, 222 Mass. 401, 111 N. E. 47. The test is whether the contributions were relied on by the dependent for his or her means of living, judging this by the position in life of the dependent, or whether the dependent is to a substantial degree supported by the employee at the time of the employee's death. The problem presented by this test is largely one of fact. Miller v. Riverside Storage & Cartage Co. (Mich.) 155 N. W. 462; Rock Island Bridge & Iron Works v. Industrial Com., 287 Ill. 648, 122 N. E. 830; Keller v. Industrial Com., 291 Ill. 314, 126 N. E. 162. In addition to the $8 retained by him from his weekly wages Henry Olson claimed his son contributed largely to his suport. It does not appear what use he made of this money, but, regardless of the use he made of it, we cannot see how it can be said that this father, who was regularly employed, and whose legal duty it was to support his family was dependent upon his son for support.

[3-5] On the other hand, Ellen Olson had no income and was necessarily dependent on some one for support. While her husband was under a legal duty to support her, the question whether she actually received all or a part of her support from her son, and looked to him for such support, is a question of fact, which upon this record is concluded by the finding of the commission that she was partially dependent upon him. Where there is no voluntary payment on the part of the employer, and the Industrial Commission must determine the compensation, it is the further duty of the commission to determine the person or persons entitled to the compensation. Keller v. Industrial Com., supra; Smith-Lohr Cool Mining Co. v. Industrial Com., 286 Ill. 34, 121 N. E. 231. This the commission has failed to do, but the record justifies a finding that Ellen Olson was the only person entitled to compensation.

The judgment is modified by awarding compensation to Ellen Olson only , and, as modified, is affirmed.

Judgment modified and affirmed.

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SPARKS MILLING CO. v. INDUSTRIAL COMMISSION et al. (No. 13253.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter 737.

1. MASTER AND SERVANT—ACCIDENTAL DEATH, WITHIN COMPENSATION ACT, PRESUMED UNDER CIRCUMSTANCES.

In a proceeding under Workmen's Compensation Act to obtain compensation for death of an employee, whose body was found on the pavement under a window of the mill where he worked, where there is no evidence of suicide or murder, the presumption against the commission of crime is sufficient to support a finding that death resulted from accident.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT—INJURY "ARISING OUT OF EMPLOYMENT," WITHIN COMPENSATION ACT, DENIED.

An injury arises out of employment, within the Workmen's Compensation Act, when the accident results from a risk reasonably incidental to the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT — COMPENSATION CLAIMANT MUST SHOW ACCIDENTAL INJURY ARISING OUT OF EMPLOYMENT.

In a proceeding under the Workmen's Compensation Act to obtain compensation for the death of a servant, the burden is on the claimant to show that death was caused by accidental injury arising out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT — INJURY ARISING OUT OF EMPLOYMENT, WITHIN COMPENSATION ACT, PROVABLE BY CIRCUMSTANTIAL EVIDENCE.

One claiming compensation for death of a servant under the Workmen's Compensation Act may show that death was caused by accidental injury arising out of the employment by circumstantial as well as direct evidence, but an award cannot be based on surmise or conjecture.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

6. MASTER AND SERVANT—EVIDENCE HELD TO SHOW INJURY ARISING OUT OF EMPLOYMENT, WITHIN COMPENSATION ACT,

In a proceeding under the Workmen's Compensation Act to obtain compensation for the death of a mill employee, whose body was found on the pavement under a window of the mill where he had been at work, evidence *held* sufficient to sustain a finding that the injuries resulting in death arose out of the employment.

(For other cases, see Master and Servant, Dec. Dig. §405[4].)

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7. MASTER AND SERVANT — DEATH FROM FALL FROM WINDOW HELD ACCIDENT "ARISING OUT OF EMPLOYMENT," WITHIN COMPENSATION ACT.

Where it was the established custom of mill employees to go to the windows for fresh air when the heated atmosphere became heavily saturated with dust, an employee, who was killed by falling to the pavement below when at the window for fresh air met his death in an accident arising out of his employment, within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Error to Circuit Court, Madison County; Louis Bernreuter, Judge.

Proceeding under the Workmen's Compensation Act by Cora J. May, executrix, to recover compensation for the death of William F. May, opposed by the Spark Milling Company, the employer. There was an award of compensation by the Industrial Commission, which was confirmed by the circuit court, and the employer brings error. Affirmed.

Samuel A. Harper, of Chicago, for plaintiff in error
Gilson Brown, of Alton, for defendant in error.

THOMPSON, J. October 12, 1918, William F. May suffered injuries at the mill of plaintiff in error which resulted in his death. He had been employed by plaintiff in error for about 12 years. At the time of the accident he was employed as a sweeper and cleaner. It was his duty to sweep the floors and clean up the dirt and mill dust, to brush and clean the machinery, and generally to keep the entire mill and its equipment clean. The mill consisted of four floors and a cupola. On the morning of the accident he left home about 6:30, which was his usual time, and went to the mill, where he changed clothes and went to work at 7 o'clock. He talked with Sam C. Willet, second miller, about 7 o'clock, and again about 7:15. Willet saw the deceased cleaning around the machinery on the fourth floor about 7:30. On this floor there is considerable machinery, including four swinging sifters. These sifters work back and forth with sufficient force to knock a man over if he gets in their way. The south end of the room on the fourth floor is 22 feet wide. At this end there are three windows. Across the west window is a table about 3 feet high. The window sill is about a foot high, leaving about 2 feet of the lower half of the window below the table. Immediately outside of this window is the platform of a fire esape, which is about on the level with the mill floor. The middle window on the south side is about 10 feet east of the window just described. Near the west window is a wheat scourer. The west sifter is about 12 feet from the west window and the sifters extend eastward; the east sifter being opposite the east window. One of the sifters extends out to within 2 or 3 feet of the edge of the middle window. There is no table and no fire escape at the middle window. The air inside the mill was usually filed with dust, and it was customary to keep all the windows open when the weather permitted.

The proof shows that the weather was clear and warm on the day of the accident, and while there is no proof that the windows were open before the accident, many wintnesses testify that they found them open immediately after the accident. We think the evidence clearly warrants the finding that the windows were open at the time of the accident. When Willet last saw and talked to deceased, at 7:30 o'clock, the latter was working between the second and third sifters, which would place him practically opposite the middle window. About 8 o'clock May was found lying on the pavement, below and slightly to the east of the west window. No one saw him fall, but Fred Collins stood within 15 feet of the place where he fell. He was attracted by the sound of the body striking the

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pavement, and turned and saw deceased lying on his back, his head toward the mill, and about 6 feet from the wall. He was unconscious, his legs were broken, and his shoulders and face bruised. He did not regain consciousness, and made no statement. The Industrial Commission found that the injury resulting in his death arose in the course of and out of his employment and awarded compensation. On certiorari the circuit court of Madison county confirmed this award. By leave of this court this writ of error is prosecuted to review that judgment.

[1, 2] Only one thing is certain and clear in this case: That William F. May was found in a dying condition, lying on the pavement below the windows of the fourth floor of this mill. There may be at least three theories, any one of which will account for his death. It might have been suicide; it might have been murder; it might have been accident, and such accident may or may not have arisen out of the employment. All who saw deceased on the morning of the accident—his family and his fellow workmen—testify that he was in his usual good spirits, and that so far as was known he had no enemies. There is no evidence of suicide or murder, and therefore the presumption against the commission of a crime is sufficient to support the finding of the commission that this death resulted from accident. Humphrey v. Industrial Com., 285 Ill. 372, 120 N. E. 816; In re Von Ette, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641; Steers v. Dumewald, 85 N. J. Law, 449, 89 Atl. 1007; State v. District Court, 138 Minn. 138, 164 N. W. 582; Bekkedal Lumber Co. v. Industrial Com., 168 Wis. 230, 169 N. W. 561. Where the evidence shows deceased to have been in good health, and there is a complete absence of evidence showing suicide, it must be presumed that the death was accidental. Wilkinson v. Ætna Insurance Co., 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269. Wiscaless v. Hammond, Standish & Co., 201 Mich. 192, 166 N. W. 993.

[3-6] We think it cannot be seriously contended that the injury causing this death did not arise in the course of the employment. The only serious question presented is whether or not the injury arose out of the employment, and this qestion is not without its difficulty. An injury arises out of the employment, within the meaning of our Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i), when the accident results from a risk reasonaably incidental to the employment. Dietzen Co. v. Industrial Board, 279 Ill. 113, 116 N. E. 684 Ann. Cas. 1918B, 764; Mueller Construction Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918E, 891, Ann. Cas. 1918E, 808. The burden was on the executrix to show that the death of May was caused by accidental injury arising out of the employment, and to show it by direct and positive evidence, or by evidence from which such inference could be drawn. Savoy Hotel Co. v. Industrial Board, 279 Ill. 329, 116 N. E. 712; Edelweiss Gardens v. Industrial Com., 290 Ill. 459, 125 N. E. 260. The proof of these facts may be by circumstantial as well as by direct evidence When it is said that the claimant must prove her case, it is meant that she must necessarily prove it by direct evidence, and that somebody actually saw what took place, because in many cases that is impossible. While the commission cannot surmise, conjecture, or guess its conclusion, yet it may draw an inference from proven facts, so long as it is a legitimate inference. Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651. We think that the facts proven clearly warranted the commission in finding that the windows on the fourth floor of the mill were open, that the deceosed was employed at his regular duties on this floor, and that he was either knocked from the middle window by one of the sifters, or that he fell from the fire escape while there recovering from exhaustion caused by the heat and dust inside the mill. Finding, as we do, that there was evidence in the record justifying these conclusions, it necessarily follows that the injuries resulting in this death

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arose out of the employment of deceased. Our conclusion in this regard find support in the following, among other authorities:

In Ohio Building Vault Co. v. Industrial Board, 127 Ill. 95, 115 N. E. 149, a night watchman was found seriously injured. The evidence strongly tended to show that his injuries were the result of a felonious assault. There were no eyewitnesses, and no direct proof as to why the assault was made. We held that the facts justified the conclusion that the assault was made for the purpose of burglarizing the building, and that therefore the injury arose out of employment.

In Peoria Railway Terminal Co. v. Industrial Board, supra, a fireman suffering from a pre-existing disease fell from his engine cab and sustained injuries resulting in his death. We held that the facts justified the inference that the fall, and not the disease, was the proximate cause of the fireman's death.

In Mechanics' Furniture Co. v. Industrial Board, 281 Ill. 530, 117 N. E. 986, a night watchman was found dead upon the premises with a bullet in his body. There were no eyewitnesses to the killing, and there was no direct evidence showing who shot the watchman or the reason for shooting him. We held that the facts and circumstances justified the commission in holding that the shooting was done by a marauder who intended to burglarize the building, and that therefore the injury arose out of the employment.

In Smith-Lohr Coal Mining Co. v. Industrial Com., 286 Ill. 34, 121 N. E. 231, a motorman was found dead on his motorcar, and the car was running without control. On investigation it was found that his neck was broken. His cap was found about a mile away, where the ceiling of passageway was low. There were no eyewitnesses to an accident in that case, and there was no direct proof showing how or where the neck of the deceased was broken. We held that the evidence justified the inference by the Industrial Commission that the head of the deceased had come in contact with the ceiling of the passageway and that his neck was broken by the force of the contact. The decision of the Industrial Commission that his death arose out of the employment was sustained.

In Stephens Engineering Co. v. Industrial Com., 290 Ill. 88, 124 N. E. 869, an employee was found on the ground below the door leading from the bin floor of an elevator. There was a pulley fastened near the top of this door for the purpose of hauling up heavy articles. On the outer wall of the building, near the door was a fire escape. There were no eyewitnesses to the accident, but we held it fair to presume from the evidence that the deceased attempted to swing by the rope carried by the pulley onto the fire escape, and that for some reason he lost his balance and fell to the ground.

In Walsh Teaming Co. v. Industrial Com., 290 Ill. 536, 125 N. E. 331, a truck driver was found pinched beneath the loading platform and the freight elevator. There were no eyewitnesses as to what the deceased was doing at the time of or immediately prior to the accident, but we held that the evidence justfied the holding of the commission that the injury arose out of the employment.

[7] In re Von Ette, supra, a compositor of a newspaper was last seen alive about 11 p. m. At 3:45 o'clock the next morning his dead body was found upon the ground, six stories below the floor where he worked. The evidence showed it to be custom of the employees to go upon the roof of an adjoining building for the purpose of getting fresh air. In deciding whether or not the injury causing Von Ette's death arose out of his employment, the Supreme Judicial Court of Massachusetts said, among other things:

'If this claimant were required to prove affirmatively all the facts and circumstances attending her husband's death by direct evidence, it is plain that her claim would fail; but she is not limited to such proof. *

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* * The accident happened upon the premises of the employer, and we think, in view of the practice which might have been found to exist under which the men went upon the roof for fresh air, that the act of the deceased in going there on a warm night was not necessarily outside of his employment, but could have been found to be incidental thereto."

And so in the instant case it was proven to be the established custom of the men to go to the windows for fresh air when the heated atmosphere became heavily saturated with dust. This case is clearly distinguishable from those cases where the employee was disobeying orders or otherwise misconducting himself.

There is nothing in this record that justifies any other conclusion than the one reached by the Industrial Commission. The judgment of the circuit court is affirmed.

Judgment affirmed.

STEEL SALES CORPORATION v. INDUSTRIAL COMMISSION ET AL. (No. 13251.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 698.

1. MASTER AND SERVANT — APPLICANT FOR COMPENSATION MAY PROVE ACCIDENTAL INJURY BY CIRCUMSTANTIAL EVIDENCE.

An applicant for compensation has the burden of proof that the injury was accidental, but such proof may be made by direct or circumstantial evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

2. MASTER AND SERVANT—INJURIES IN WASHROOM INCIDENTAL TO EMPLOYMENT WITHIN COMPENSATION ACT.

An employee while at work for his employer may go to the washroom for a purpose personal and necessary to himself, and such acts will be considered incidental to his employment, so that compensation may be awarded for accidental injuries received while there.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

3. MASTER AND SERVANT—PARTY TO COMPENSATION PROCEEDING CANNOT OBJECT TO EVIDENCE BROUGHT OUT BY OWN CROSS-EXAMINATION.

On review of an award by the Industrial Commission, an employer cannot object to testimony as hearsay which he brought out by his cross-examination of applicant, where he made no objection or motion to strike it from the record.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

4. MASTER AND SERVANT—"ACCIDENT" WITHIN COMPENSATION ACT DEFINED.

The word "accident," as used in Workmen's Compensation Act, should not be construed technically, but includes every injury suffered in the course of employment, if it can be traced to a definite time, place,

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and cause, and occurred unexpectedly without affirmative act or design of the employee.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Accident.)

5. MASTER AND SERVANT — INJURIES BY BURNING FROM MATCHES CARRIED HELD TO ARISE OUT OF EMPLOYMENT WITHIN COMPENSATION ACT.

Where there was no rule forbidding the carrying of matches, though smoking was forbidden, the commission could find that injuries to an employee caused by the burning of his oilsoaked clothing, ignited accidentally from matches which he carried while he was in the washroom, arose out of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

6. MASTER AND SERVANT—FINDING WARRANTED BY EVIDENCE CONCLUSIVE.

Where there is evidence which warrants an inference that the injury arose in the course of the employment, the court, on writ of error to review an award of compensation by the commission, cannot hold as a matter of law that the accident did not arise out of or in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by John Schwinn, administrator, for compensation for the death of Frederick Schwinn, employee, opposed by the Steel Sales Corporation, employer. An award of compensation by the Industrial Commission was affirmed by the circuit court, and the employer brings error. Affirmed.

Frank M. Cox and Albert N. Powell, both of Chicago, for plaintiff in error.

Harry A. Fleck, of Chicago, for defendant in error.

CARTER, J. Frederick Schwinn, an employee of the plaintiff in error corporation working as a machine hand, went into the toilet room of the building of said company on November 9, 1916, and while there his clothing caught fire, and before it was extinguished he was so badly burned that he died. The arbitrator found the injury did not arise out of the employment. The Industrial Commission found to the contrary and made an award, which was affirmed by the circuit court. The cause is now here on writ of error.

The duties of the deceased were to cut cold steel plates on a cutting machine in the basement of plaintiff in error's plant, his working hours being from 7:30 to 5:30 each day, with half an hour for lunch. He worked on a machine with a fellow employee about 80 or 100 feet from the washroom, which latter room contained lockers for the employees' street clothes and a drinking faucet. A toilet was located in one corner of the washroom, being divided from the rest of the room by a partition extending part way to the ceiling. There was only one window in the room, admitting but little light, and an electric light was suspended from the ceiling just outside the toilet room, but not in such a position as to thoroughly light the same. At the time of the accident deceased had his working clothes on—overalls and an apron but no coat—and the evidence tends to show that his working clothes had become oily from his work. Immediately prior to the accident deceased's brother and two

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other employees were in the washroom. One of them still remained in the washroom when deceased went into the toilet, but at the exact time deceased's clothing was ignited none were near him or where they could see him. He had been in the toilet only a moment when he ran out with his clothing on fire, passing the man in the washroom, then to the basement workroom and on upstairs past his brother, who tried to hold him and throw water on him, and then out into an alley, where finally, after most of his clothing had been burned away, a blanket was thrown around him and the fire put out. The brother of the deceased, on cross-examination by counsel for plaintiff in error here, stated the deceased had said to him shortly after the accident as to the cause of the fire, "I went into the washroom and bumped into the locker and had matches in my pocket." A rule was in force in plaintiff in error's plant prohibiting smoking. There is no testimony that deceased was smoking or had been smoking immediately before the accident. The proof shows that he did carry matches in his pocket, but there appears to have been no rule as to this last point.

[1, 2] The principal question raised here is whether the injury arose out of and in the course of the employment. The applicant has the burden of proof as to whether the injury was accidental and as to its cause, but it is not necessary, in order to make this proof, that such testimony be given by an eyewitness. The proof may be made by direct or circumstantial evidence. Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Mechanics' Furniture Co. v. Industrial Board, 281 Ill. 530, 117 N. E. 986; Northern Illinois Traction Co. v. Industrial Board, 279 Ill. 565, 117 N. E. 95. An employee while at work for his employer may do those things which are necessary to his own health and comfort, even though they are personal to himself, and such acts will be considered incidental to his employment. Rainford v. Chicago City Railway Co., 289 Ill. 427, 124 N. E. 643; Nelson Construction Co. v. Industrial Com., 286 Ill. 632, 122 N. E. 113; 1 Honnold on Workmen's Comp. § 111; Papinaw v. Grand Trunk Railway Co., 189 Mich. 441, 155 N. W. 545, 12 Neg. & Comp. Cas. Ann. (Ill. Ed.) 243, and cases cited in note. Harper on Workmen's Comp. § 39; Corpus Juris, treatise on Workmen's Comp. Acts, § 69. There can be no question, under the authorities, that the deceased had a right to be where he was at the time of the accident. Somewhat analogous as to facts, though with perhaps not the same reason for the application of compensation acts, are those cases where an accident arises from something incidental to smoking, where smoking has not been prohibited by the employer. Such accidents have frequently been held to be covered by compensation acts as arising out of the employment. Bradbury on Workmen's Comp. (3d Ed.) § 88, p. 660; Boyd on Workmen's Comp. Act (1913) § 482.

In McLaughlan v. Anderson, 4 B. W. C. C. 376, a workman was injured in attempting to regain his pipe which he had dropped. In that case the opinion states (p. 378):

"I think an accident befalls a man 'in the course of' his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing. Now, this man's operation in getting down from the wagon to recover his pipe seems to me to satisfy all these conditions. Taking them in their inverse order, he had a right to be at the place, riding or walking beside the wagons; he was within the time during which he was employed, because the accident happened during the actual period of transit; and he was doing a thing which a man, while working, may reasonably do. A workman of his sort may reasonably smoke, and he may reasonably drop his pipe, and he may reasonably pick it up again."

A workman during a lull in his work struck a match to light a

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cigarette, which ignited an apron which he had on and which his work required him to wear and which had naturally become oil-soaked. The employer was held to be liable under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i). Dzikowska v. Superior Steel Co., 259 Pa. 578, 103 Atl. 351, L. R. A. 1918F, 888.

In another case, where the accident was somewhat similar to the one here under consideration, the cause of the fire was not directly shown. The employee had on his working clothes and the flannel shirt he wore had become somewhat saturated with oil from his work. There was no rule against smoking in the factory. His shirt became ignited and he was injured and was permitted to recover. Chuldzinski v. Standard Oil Co., 176 App. Div. 87, 162 N. Y. Supp. 225.

In a number of cases shown in a note to Standard Oil Co. v. Reagan, 8 Neg. & Comp. Cas. 209, employers have been held liable for injuries arising from employees or others causing explosions, striking matches, and the like. In the Chludzinski Case, supra, although smoking was prohibited and matches were not required in the performance of the duties of the deceased, yet so far as shown there was no rule against carrying matches or any further prohibition against the risk of igniting materials.

[3, 4] Counsel for plaintiff in error argue that the brother's testimony that deceased told him the matches were ignited by striking against the locker was hearsay testimony and therefore improperly admitted. We do not see how counsel for plaintiff in error are entitled to raise this question. That evidence was brought out on cross-examination by counsel for plaintiff in error, and we can find no objection made to it or motion to strike it from the record. The word "accident," as used in the Workmen's Compensation act, should not be construed technically. It was meant to include:

Every injury suffered in the course of employment "for which there was an existing right of action at the time the act was passed; also to extend the liability of the employer to make compensation for injuries for which he was not previously liable and to limit such compensation. If an injury can be traceable to a definite time, place and cause and the injury occurs in the course of the employment, the injury is accidental within the meaning of the act." Baggot Co. v. Industrial Com., 290 Ill. 530, 125 N. E. 254.

The injury, to be accidental, "must be traceable to a definite time, place and cause, but if there is such a definite time, place and cause and the injury occurs in the course of the employment the injury is accidental within the meaning of the act. * * * While it is not intended, and perhaps not possible, to give a definition of the words used in the act as applied to all possible circumstances, it may safely be said that an injury is accidental, within the meaning of the act, which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee." City of Joliet v. Industrial Com., 291 Ill. 555, 126 N. E. 618.

[5, 6] Carrying matches is a very common practice among men, especially those who smoke, in all employments, and unless expressly prohibited, where the surroundings are not apparently dangerous for employees to carry matches, it could hardly be held unreasonable, as a matter of law, for an employee, under the circumstances here shown, to have matches in his possession. Under the evidence in this record we think the Industrial Commission was justified in finding that it was a reasonable inference that the accident arose out of and in the course of the employment, and, there being such evidence in the record, it cannot be held as a matter of law by the court that such accident did not arise out of or in the course of the employment.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

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WEIS PAPER MILL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 13263.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 732.

1. MASTER AND SERVANT—INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT DEFINED; "RISK INCIDENTAL TO EMPLOYMENT."

To recover for an accident under the Workmen's Compensation Act, it must have arisen out of and in the course of the employment, that is, have resulted from a risk reasonably incidental to the employment; and a risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his contract of service.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment; Risk.)

2. MASTER AND SERVANT—COMPENSATION ACT DOES NOT MAKE EMPLOYER INSURER.

An employer within the Workmen's Compensation Act is not an insurer of the safety of his employees, and is liable for compensation only for an injury which occurs to the employee while performing some act in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

3. MASTER AND SERVANT—INJURIES TO EMPLOYEE SLEEPING ON SWITCH TRACK DURING LEISURE PERIOD HELD NOT WITHIN COMPENSATION ACT; "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where an employee loading wagons of straw at a stack sought rest in the shade of a box car during his leisure period and fell asleep and was fatally injured by the moving of the car, the injury did not arise out of or in the course of the employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Error to Circuit Court, Adams County. Albert Akers, Judge.

Claim by Pearl Klosing, under the Workmen's Compensation Act, for compensation for the death of Charles P. Klosing, against the Weis Paper Mill Company. Compensation was awarded by the arbitrator and the Industrial Commission, and the circuit court confirmed the decision of the Commission in proceedings by the employer against the Industrial Commission and others, and the employer brings error. Reversed.

Fyffe, Ryner & Dale, of Chicago, for plaintiff in error.
John E. Wall, of Quincy, for defendant in error.

CARTER, J. Charles P. Klosing at the time of his injury, in June, 1918, was employed by plaintiff in error in loading wagons of straw near its mill. During a rest period, while lying in the shade of a box car on a switch track on plaintiff in error's premises, the car was backed up and ran over his legs, crushing them, and he died the next day in the

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hospital. Compensation was awarded by the arbitrator and the Indus-commission. The cause has been brought to this court on writ of error.

The record shows no controversy as to the facts. The plaintiff in error operated a paper mill in Quincy, Adams county. A large straw-stack was situated about half a block south of the mill. There was also a shed 300 or 400 feet from the stack, and there were switch tracks on the mill premises between the shed and the stack. The employees were accustomed to go to the shed for drinking water and kept some of their clothes there. Two wagons were employed in taking the straw to the mill from the stack. While one was going to the mill and being unloaded the other would be in process of loading at the stack. Klosing's work was to assist in loading wagons at the stack and other employees had charge of taking the wagons to the mill and unloading them. The evidence shows that the men loading at the stack, would frequently have to wait until a space was cleared upstairs in the mill for the unloading of the straw hauled there. The deceased and two other persons who were engaged in loading the wagon at the strawstack were resting during such an interval while a wagon was being unloaded at the mill at the time this accident occurred. It seems to have been a very warm day, and no point is made that it was the duty of the deceased to be working at the time of his injury, but it is argued, rather, that the spot he chose for his rest was improper and dangerous; that it could not reasonably have been contemplated in the contract of employment that the deceased, while he had no duties to perform at the strawstack, would lie down on the switch track in the shade of a freight car, which might be moved at any time. It appears from the record that a switch engine came upon that track twice a day. It is also shown that there was shade at the stack where the deceased had been working, and he could have gone to the shed to rest if he had desired.

[1-3] In order for an employee to recover for an injury, such injury must have arisen out of and in the course of the employment. This court has said that to recover for an accident under the Workmen's Compensation Act (Laws 1913, p. 335 it must result from a risk reasonably incidental to the employment; that an accident arises in the course of the employment if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing; that an accident arises out of the employment when it is something the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it. A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. It may be incidental to the employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected therewith. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764. This court has said that it was not intended by this act that the employer who comes within its provisions shall be the insurer of the safety of the employee.

"The employer is liable for compensation only for an injury which occurs to the employee while performing some act for the employer in the course of his employment or incidental to it." Fairbank v. Industrial Com., 285 Ill. 11, 120 N. E. 457.

"An accident, to be within the Workmen's Compensation Act, must have had its origin in some risk of the employment." Edelweiss Gardens v. Industrial Com., 290 Ill. 459, 125 N. E. 260.

Conceding that it may be fairly inferred from the facts in this record that this accident arose in the course of the employment, it may well be questioned whether it arose out of the employment. It is not the rule that all accidents which happen during the leisure periods of the

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employee in attendance on personal comforts or necessities are held not to arise out of the employment; for, if an accident happens at such a time, there would be no break in the employment, even though the employee is paid for the time he is actually at work, especially when the accident occurs on the employer's premises or about his property, unless the workman is doing something wholly foreign to his employment. Acts of ministration to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, the performance of which while at work are reasonably necessary to his health and comfort, are incidental to the employment. 1 Honnold on Workmen's Comp. § 111, and cases cited; Whiting-Mead Commercial Co. v. Industrial Accident Com., 178 Cal. 505, 173 Pac. 1105. See, also, Papinaw v. Grand Trunk Railway Co., 12 Neg. & Comp. Cas. Ann. (Ill. Ed.) 243, and cases cited in note.

Where a ship's engineer in an intensely cold place rigged up a temporary stove to warm his cabin, though he was told during the daytime by his superior officer that it was dangerous and warned not to use it at night, it was held that it was reasonably necessary to have his cabin heated at night, and, the engineer having been asphyxiated at night, it was held the accident arose out of the employment. Edmunds v. Owners Steamship Peterson, 5 B. W. C. C. 157.

Where an employee, after having worked outside in wintry weather for several hours, came into a building, and while awaiting an opportunity to use a freight elevator to carry up beef for his employer sat down in front of the fire box of the boiler and fell asleep, and a few minutes after was awakened by finding his greasy clothing on fire, it was held that upon these facts the arbitrator or commissioner properly found that the injury arose out of the employment. Richards v. Indianapolis Abattoir Co., 92 Conn. 274, 102 Atl. 604.

In a plant manufacturing iron briquettes the injured employee was engaged in dumping cars loaded with briquettes as they came out of the plant——one car about every 15 minutes—and had intervals of rest between unloading them. A car loaded with warm briquettes came out of the plant, and he blocked it and sat or lay down on the track to get warm from the heat of the briquettes, the night being very cold and while lying there or while picking up the briquettes in a recumbent position after getting warm he was caught and injured by the next loaded car. It was held that he was entitled to recover. Northwestern Iron Co. v. Industrial Com., 160 Wis. 633, 152 N. W. 416.

An employee working during the night shift ate his supper, for the sake of warmth, while seated on a tank in the pump room. His employers had provided a dining room for the workmen, but they were not bound to take their meals there. In getting off the tank this employee fell through an aperture in the tank and was scalded, receiving injuries from which he died. It was held that the accident did not arise out of the employment. Brice v. Lloyd, 2 B. W. C. C. 26.

Where a sailor went on deck from his cabin in the course of his employment on a hot night for the purpose of getting fresh air and disappeared, his body being found the next day in the water close to the ship, it was held the accident was not shown to have arisen out of the employment. Marshall v. Owners of Ship Wild Rose, 2 B. W. C. C. 76.

A workman ordered by his foreman to proceed from one part of the work to another stopped, saying that he was going to ease himself. He was later found dead in a hoist where it was unreasonable for him to go and where he could not have gone by mistake. It was held that the accident did not arise out of the employment. Rose v. Morrison & Mason, 4 B. W. C. C. 277.

A city employee doing teaming for the city with his own horses and cart, during the noon hour of the day on which he had been hauling coal

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from a pile near a railroad, sat down to eat his lunch on the railroad track, when another car struck the car against which he was leaning, causing it to "kick." It was held he was not injured in the course of his employment and could not recover from the city under the Compensation Act; that he incurred "a danger of his own choosing and one altogether outside of any reasonable exercise of his employment." Haggard's Case (Mass.) 125 N. E. 565.

To recover on the ground that an accident arose out of the employment, under the authorities it must be held that what the employee was doing was reasonably incident to the employment. He must not unnecessarily increase the risk of injury to himself, and so the risk of liability of his master, beyond that contemplated in his contract of employment. He may not choose an unnecessarily dangerous place for the doing of such things, nor may he do them in an unnecessarily dangerous way. 25 Harvard Law Review, 411, and cases cited. It would hardly be considered as a reasonable incident of the employment that an employee, in the interval of rest between the loading of two wagons, would lie down on the switch track, in the shade of a box car, and run the risk of going to sleep, when the track was known to be used by switch engines during the day; and it does not materially affect this conclusion that at the time Klosing lay down on the tracks, and before he went to sleep, two of his fellow employees were near him, though we conclude from the record that they had left before the car was backed. This case differs in its facts materially from that of Northwestern Iron Co. v. Industrial Com., supra, where the duties of the injured employee required him to be working continuously in and around the tracks and the cars by which he was injured. Here the employee's duties did not so require. He could have rested, if he desired, during the interval between the loading of the wagons, in the shade of the strawstack or in the shed where some of his clothes were, but he chose, for his own convenience, an unreasonably dangerous place, thus exposing himself to a wholly unnecessary risk. We cannot hold that there would be a resonable implication in the contract of employment that this employee might rest in such a dangerous place during the interval between his periods of actual work in loading wagons.

The judgment of the circuit court will therefore be reversed.

Judgment reversed.

BOARD OF COM'RS OF GREENE COUNTY v. SHERTZER ET AL.

(No. 10790.)

(Appellate Court of Indiana. Division No. 1. June 25, 1920.)

127 Northeastern Reporter, 843.

1. MASTER AND SERVANT — PAINTER HELD A "SERVANT" WITHIN COMPENSATION ACT, AND NOT AN INDEPENDENT CONTRACTOR.

One hired to do painting and paper hanging, at 50 cents per hour for painting and 30 cents a roll for paper hanging, who was his own boss as to how the paint and paper was to be put on, with appliances and materials furnished by the owner of the building, *held* a "servant," within the Workmen's Compensation Act, and not an independent contractor.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Servant.)

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2. MASTER AND SERVANT — DEATH BY FALL DURING ATTACK OF VERTIGO HELD ACCIDENT, WITHIN COMPENSATION ACT; "ARISING OUT OF EMPLOYMENT."

Where a painter standing on a ladder by reason of his employment fell as the result of sudden attack of vertigo, the injuries causing his death resulted from an accident "arising out of his employment" and not from disease, and compensation under the Workmen's Compensation Act was allowable.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

3. MASTER AND SERVANT—INDUSTRIAL BOARD'S FINDING ON EVIDENCE FINAL.

A finding by the Industrial Board that the death of an employee was the result of an accident arising out of the employment, within the Workmen's Compensation Act, will not be disturbed, where there is evidence to support it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Claim under the Workmen's Compensation Act (Laws 1915, c. 106) by Jennie M. Shertzer and another for the death of John H. Shertzer, an employee, against the Board of Commissioners of Greene County, employer. From an award of the Industrial Board in favor of claimants, the employer appeals. Affirmed.

William L. Cavins, of Bloomfield, D. W. McIntosh, of Linton, and Guy H. Humphreys, of Bloomfield, for appellant.

William L. Slinkard, of Bloomfield, for appellees.

REMY, J. The superintendent of the county poor asylum of Greene county, by oral direction of the board of commissioners of said county, the appellant herein, employed one John H. Shertzer, a painter and paperhanger, to do certain painting and paper hanging, for which work said Shertzer was to receive 50 cents an hour for painting and 30 cents a roll for hanging the paper. Appellant was to, and did, furnish the necessary ladders and scaffolding, and was also to select and furnish the paints, paper, and other materials to be used in the work. Shertzer was to be "his own boss" as to how the paint and paper was to be put on. A few minutes after he had eaten a heavy dinner, and while doing the work, Shertzer fell from a ladder on which he was standing and upon the floor of the room where the work was being done. When asked how he came to fall, he replied that he "became dizzy, and seemed to be going round and round." As a result of the injuries thus received, Shertzer died ten days later. The physician who attended him stated that dizziness such as was complained of by Shertzer might have been the result of eating an excessive meal.

Appellees, who were the dependents of Shertzer, made application to the Industrial Board for compensation, and, upon hearing evidence showing the above facts, the board found that Shertzer at the time of his injury was in the employment of appellant, and that his death was the result of an accident arising out of and in the course of such employment, and made an award in favor of appellee Jennie M. Schertzer. Appellant has assigned as error that the award is not sustained by sufficient evidence, and is contrary to law.

It is first urged by appellant that Schertzer at the time of the accident which resulted in his death was an independent contractor, and that there

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is no evidence to sustain the finding of the Industrial Board that he was at that time in the employment of appellant.

[1] It appears from the evidence, as above stated, that Shertzer was hired to do the painting and paper hanging, the materials to be selected and furnished by appellant; that appellant was to supply the ladders and scaffolding required in the conduct of the work and that his compensation was to be 50 cents an hour for the painting and 30 cents a roll for the papering. Under such contract Shertzer could have ceased work at any time he chose, and appellant could have discharged him at any time. The evidence that in the work of putting on the paint and paper Shertzer "was his own boss" must be considered in conection with the other evidence as to the relationship of the parties to the contract, and when so considered it cannot be said that Shertzer must be held to have been an independent contractor. We hold that there is evidence to support the finding of the Industrial Board that Shertzer was at the time in the employment of appellant. See Muncie Foundry, etc., Co. v. Thompson, 123 N. E. 196. Caca v. Woodruff, 123 N. E. 120; Zeitlow v. Smock, 117 N. E. 665.

It is asserted by appellant that it conclusively appears from the evidence that Shertzer fell to his death as a result of an attack of vertigo, and that therefore there can be no recovery of compensation, even though it should be found that at the time of the accident he was in the employ of appellant.

[2] If it be conceded that Shertzer's fall was the result of vertigo, it does not follow that the cause of his death was the disease. A fall as a result of vertigo would not, in all probability, have caused death or serious injury, had it not been for the fact that Shertzer was at the time, and by reason of his employment, standing upon the ladder. The exact question here presented was recently decided by this court adversely to appellant's contention. Miller v. Beil, 127 N. E. 567. See, also, Carroll v. What Cheer Stables Co., 38 R. I. 421, 96 Atl. 208, L. R. A. 1916D, 154, Ann. Cas. 1918B, 346; Wicks v. Dowell & Co., 2 K. B. 225, 2 Ann. Cas. 732.

[3] The question as to whether or not the death of the employee was the result of an accident arising out of his employment was a question for the Industrial Board. American Hominy Co. v. Davis, 126 N. E. 703. There is evidence to support the finding and award.

The award is affirmed, and by virtue of the statute the amount is increased 5 per cent.

INDIAN CREEK COAL & MINING CO. v. BEACH. (No. 10734.)

(Appellate Court of Indiana, Division No. 1. June 22, 1920.)

127 Northeastern Reporter 850.

MASTER AND SERVANT—BOOKKEEPER'S KNOWLEDGE OF EMPLOYEE'S INJURY HELD NOT NOTICE TO EMPLOYER REQUIRED BY COMPENSATION ACT.

That employer's bookkeeper had actual knowledge of employee's injury did not dispense with necessity of giving employer, a corporation, the written notice required by Workmen's Compensation Act, § 22, which notice required to be served on employer or agent on whom a summons in a civil action could be served.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

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Appeal from Industrial Board.

Proceeding under Workmen's Compensatoin Act by Cora Beach for compensation for death of her husband, Paris H. Beach, opposed by the Indian Creek Coal & Mining Company, employer. Award for claimant by the Industrial Board, and the employer appeals. Reversed and remanded.

Chas. E. Henderson and James L. Murray, both of Indinapolis, for appellant.

John A. Riddle, of Vincennes, for appellee.

ENLOPE, P. J. One Paris H. Beach was, on the 29th day of November, 1917, an employee of the appellant company, and it is claimed that on said date he received an injury by being struck in the pit of the stomach, while engaged at his work, by a "jack pipe," which then and there fell. On the 5th day of July, 1919, the said Paris H. Beach filed an application before the Industrial Board, for the adjustment of his claim for compensation for said alleged injury. The case was first heard by one member of the board, but before an award was made the said Paris H. Beach died of cancer of the stomach. Thereafter by agreement of the parties, his widow, Cora Beach, was substituted as a party to the action. The one member of the board who heard said cause made an award, allowing the appellee compensation at $13.20 per week for 300 weeks and burial expenses not exceeding $100. Application was duly made for the review of such award by the full Industrial Board, which application was granted and such review had.

Upon review by the full board said board by a majority of its members made the following finding:

"* * * And the full board having heard the argument of counsel, having reviewed the original evidence, and being fully advised in the premises finds by a majority of its members that on the 29th day of November, 1917, one Paris H. Beach was in the employment of the defendant at an average weekly wage in excess of $24; that on said date he received a personal injury by an accident, arising out an in the course of said employment, which resulted in his death on the 24th day of July, 1919. That the defendant had actual knowledge of the injury to the said Paris H. Beach on the first or second day after it occurred, and had actual knowledge of his death immediately after it occurred. That the said Paris H. Beach left as his sole and only dependent the plaintiff, Cora Beach, his wife, with whom he was living at the time of his injury and death."

Upon which finding by a majority of its members, it, by a majority of its members, made the same award heretofore stated. From this award this apeal is prosecuted, and the appellant alleges that "the award of the full Industrial Board of Indiana is contrary to law."

The appellant contends that the said award is contrary to law for the reason "that the uncontradicted evidence shows that no notice of any accident or injury to the deceased was given to his employer, and that his employer had no knowledge of the same within the time required by the statute."

Section 22 of the Compensation Act (Acts of 1915, p. 392) provides:

"Every injured employee or his representative shall immediately upon the occurence of an injury or as soon thereafter as practicable give or cause to be given to the employer written notice of the injury and the employee shall not be entitled to pyhsician's fees nor to any compensation which may have accrued, under the terms of this act, prior to the giving of such notice; unless it can be shown that the employer, his agent or

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representative had knowledge of the injury or death, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person, or for equally good reason; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the injury or death, unless reasonable excuse is made to the satisfaction of the Industrial Board for not giving such notice."

In this case there is no claim that any written notice was given, nor are any of the reasons mentioned in said section for not giving such written notice offered in this case save and except the first only, to wit, "that the appellant had actual knowledge of the said alleged injury on the first or second day after the same occurred," and that therefore, under said section of the statute, no notice was required.

The Industrial Board found in accordance with the claim of the appellee that the appellant had such actual knowledge, and the question which we have to consider is . Is there any evidence in the record to support said finding? If there is, this award must be affirmed, otherwise reversed. The deceased in his said application for compensation had alleged that the appellant had actual knowledge of said injury, and at the hearing there was an attempt to establish this fact. The deceased in his testimony given before the one member of the Industrial Board had testified, so far as material to the point now under consideration:

"Mr. Blakely was with me. * * * It knocked the breath out of me and Mr. Blakely carried me back, but I went back to work in a couple or three hours. * * * After my injury and at the time no representative of the mine or any of the bosses knew anything of it unless some one told them. I did not tell them. * * * William McQuade was the superintendent at the time. I did not talk to him about it. * * * I did not talk to any one, except some of the men. I do not know which ones. * * * I think Mr. Gray is the only one I told about getting hit. I never gave the mine any other kind of notice, or take any thought about it. * * * I never sent regular word to my boss. * * * I told Mr. Gray about getting hit in the stomach the night following. * * * I think he asked me why I was not at work. * * * I do not remember that I told Mr. Gray to tell them I was sick. * * * At the time the jack pipe blew off I told Ed Gray, the bookkeeper, about it when I came home. He lived right here. * * * I talked to Jack or Pat or Bill [McQuade]—I don't know which one."

From the foregoing it conclusively appears that the knowledge, which it was necessary for appellant to have, which would excuse the giving of the notice required by the statute, must rest, if at all, upon the conversation had, as testified to between the deceased, Paris H. Beach, and Ed Gray, one of the bookkeepers at appellant's mine. Was notice to Ed. Gray a sufficient notice to bind appellant in the matter of its having knowledge?

The statute then in force concerning the giving of notice (section 23 of said act) provided:

"Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of this state. * * * "

It will not be contended that a summons served on Ed Gray, as one of the bookkeepers, at his home at the time and under the circumstances disclosed by the testimony of the deceased, without a further showing that there was no superior officer of appellant company in said county upon whom service of process could be had, would be a valid service; and it has been expressly held that a conversation between the wife of an injured employee and the bookkeeper, at the employer's factory, was not a verbal notice to the employer of the accident, nor can it be inferred

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that the bookkeeper was under any duty to communicate what the wife told him to the employer, or that he actually did so. Eydman v. Premier, etc., Co., Ltd. (1915) W. C. & Ins. Rep. 82.

The finding of the Industrial Board as to the appellant's knowledge of said accident, not being sustained by any evidence, the said award is therefore contrary to law. The award of the Industrial Board is therefore reversed, and this cause remanded to the Industrial Board for further proceedings.

MILLER ET AL. v. BEIL ET AL. (No. 10759.)

(Appellate Court of Indiana, Division No. 1. June 2, 1920.)

127 Northeastern Reporter, 567.

1. MASTER AND SERVANT — DEATH OF EPILEPTIC FROM DROWNING IN TANK AN ACCIDENT "ARISING OUT OF EMPLOYMENT."

Where an epileptic employee during a seizure fell into a tank of water because in a position where his employment required him to be, and was drowned, the accident "arose out of his employment," though its remote cause was to be found in his own physical condition, and his dependents were entitled to compensation under Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.

2. MASTER AND SERVANT—ACCIDENT ARISING OF EMPLOYMENT QUESTION OF FACT FOR INDUSTRIAL BOARD.

Whether or not the death of an employee was the result of an accident arising out of his employment was a question of fact for the Industrial Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act for the death of Carl Beil, the employee, by Frank J. Beil and Charlotte E. Beil, against Jacob Miller and John Young, the employers. Compensation was awarded by the Industrial Board, and the employers appeal. Judgment affirmed.

Turner, Merrell & Locke, of Indianapolis, for appellants.
O. E. Brumbaugh, of Frankfort, for appellees.

REMY, J. Appellants were in the business of threshing wheat and other grain. Steam power was used, and appellants had in their employ at the time one Carl Beil whose duty it was to haul water from a nearby reservoir, in a water tank drawn by horses. The water tank was made of wood, and was 7½ feet long, 3 feet wide, and 28 inches deep, with an opening in the top 23 inches square. By the side of the opening, and fastened to the top of the tank, was a pump. When the tank was being filled, the water was pumped through a hose which connected the pump with the reservoir. In operating the pump it was necessary for Beil to

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stand on the top of the tank near the opening. On the morning of July 12, 1919, and a short time after Beil in the course of his employment had gone to get water, the tank, partially filled with water, was found at the reservoir, and in the tank was the lifeless body of Beil. The employee who thus lost his life was subject to epilepsy.

Appellees, who were the dependents of Beil, made application to the Industrial Board for compensation, and, upon hearing the evidence showing the above facts, the board found that said employee died as the result of an injury received by him by reason of an accident arising out of and in the course of his employment, and made an award.

Appellants have assigned as error that the findings and award are not sustained by sufficient evidence, and are contrary to law. It is urged by appellants that there is no evidence to show that the death of the employee was the result of an injury arising out of his employment, but that "from all the evidence in the case it appears conclusively that the death was the result of a disease to which deceased was subject," and that, under clause (d) of section 76 of the Workmen's Compensation Act (Acts 1915, p. 416), the dependents are not entitled to compensation.

[1] Conceding that the evidence does conclusively show that decedent fell in the tank as a result of an epileptic fit, it does not follow that the cause of his death was the disease. Had it not been that his employment required him to work at or near the opening in the tank, the epileptic fit may not have caused death. Beil's death, which was by drowning, came about because he fell into the tank, and from a position in which his employment required him to be. The accident none the less arose out of his employment because its remote cause is to be found in his own physical condition. Carroll v. What Cheer Stables Co., 38 R. I. 421, 96 Atl. 208, L. R. A. 1916D, 154, Ann. Cas. 1918B, 346; Wicks v. Dowell & Co., 2 K. B. 225, 2 Ann. Cas. 732.

[2] The question as to whether or not the death of the employee was the result of an accident arising out of his employment was a question of fact for the Industrial Board. American Hominy Co. v. Davis, 126 N. E. 703. There was some evidence to support the finding.

Judgment affirmed.

INDIANA POWER & WATER CO. v. MILLER. (No. 10760.)

(Appellate Court of Indiana, Division No. 2. June 24, 1920.)

127 Northeastern Reporter, 837.

MASTER AND SERVANT — EVIDENCE HELD TO SHOW BLINDNESS RESULTED FROM INJURY AND NOT FROM DISEASE.

Evidence that an employee's sight began to fail shortly after an injury to one eye, and that in seven months he lost the sight of both eyes, with expert testimony that the condition might have resulted from the injury, *held* sufficient to support a finding that blindness was due to the injury; claimant not being required to present proof which entirely excluded the possibility that his blindness was due to constitutional disease.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act (Laws 1915, c. 106) by John E. Miller against the Indiana Power & Water Company

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to recover compensation for loss of sight. From an award of compensation by the Industrial Board, the employer appeals. Award affirmed, and increased 5 per cent.

J. W. Fesler, Harvey J. Elam, and Howard S. Young, all of Indianapolis, and Emison, Hoover & Gregg, of Vincennes, for appellant.
John Riddle, of Vincennes, for appellee.

McMahon, C. J. Appellee, while working in appellant's coal mine, received an injury in his left eye; following this injury he was not able to work for two or three weeks; he had the eye treated by eye specialists; his sight began to fail shortly after the injury, and in six or seven months thereafter he had completely lost the sight of both eyes.

The Industrial Board found that the injury complained of arose out of and in the course of appellee's employment while working for appellant, and awarded 500 weeks' compensation at the rate of $13.20 per week, with the provision that the total compensation should not exceed $5,000. Appellant appeals from this award, and contends that the award is not supported by the evidence and is contrary to law. There is no contention over the finding that appellee was injured in the course of his employment by being struck in the eye with a piece of coal or something. Appellant contends that there is no evidence that this injury caused appellee to lose his eyesight, but that the undisputed evidence shows that the blindnes was caused by a constitutional disease. In support of this contention appellant insists that, in a case of this kind, the fact that the blindness was the result of the injury must be proven by the testimony of physicians, and that such fact cannot be proven by nonexpert witnesses.

It is not necessary for us to pass upon this contention, as Dr. Knapp, in answering the first question asked by appellant on cross-examination, testified that the condition of appellee's eyes, the atrophy of the optic nerves in both eyes, might have resulted from the injury suffered by appellee in February, 1917. This statement, when taken with the other evidence, is sufficient to support the award. We have carefully examined the evidence as set out in the briefs and as shown by the record, and find that there is ample evidence to support the award.

Appellee was not required to present such proof as would entirely exclude the possibility that his blindness was due to a constitutional disease. Bucyrus Co. v. Townsend, 117 N. E. 656.

Award affirmed, and increased 5 per cent.

BIANCHI v. BOARD OF COM'RS OF PORT OF NEW ORLEANS.
(No. 23538.)

(Supreme Court of Louisiana. May 3, 1920.)

84 Southern Reporter, 657.

(Syllabus by Editorial Staff.)

MASTER AND SERVANT—EVIDENCE HELD TO SHOW THAT EMPLOYEE, SUING FOR COMPENSATION, HAD RECOVERED.

In action under Employers' Liability Act by employee, who had received compensation while he was out of work because of injury, and who had returned to work and had been thereafter discharged, evidence

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held to sustain finding that employee had regained his capacity for work before being discharged.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Appeal from Civil District Court, Parish of Orleans; Hugh C. Cage, Judge.

Action by Charles Bianchi against the Board of Commissioners of the Port of New Orleans. Judgment for defendant, and plaintiff appeals. Affirmed.

James J. McLoughlin, of New Orleans, for appellant.
James Wilkinson, of New Orleans, for appellee.

O'NIELL, J. Plaintiff appeals from a judgment rejecting his demand for compensation under the Employers' Liability Act (Laws 1914, p. 44). He sprained his back, or suffered what the doctors call a subluxation of the spine, while working as a carpenter for the defendant board. The injury did not compel him to quit work until four days after the occurrence. He was then attended by defendant's physician, and later by his own physician, and, on the advice of defendant's physician, was put on the compensation roll. He received compensation for five weeks, $15 for the first week and $10 a week for four weeks. At the end of the five weeks he applied to defendant's physician for a certificate with which he might return to work. When he applied for re-employment, he stated that he was not yet able to do hard work, and was therefore given a position as watchman. At the end of three weeks he was discharged. It appears that there was cause for his discharge, and that it had no relation his physical condition. He applied, then, to be re-employed as a carpenter, and was tendered employment; but, because of a disagreement as to the wages he demanded, he declined to return to work. Thereafter, he made application to defendant's physician to be reinstated on the compensation roll, and, on the doctor's refusal to issue the certificate, he brought this suit.

The district judge, in his reasons for judgment, states that he was convinced by the testimony that plaintiff had regained his capacity for work before he was discharged from the position of watchman. Having carefully read the testimony, we concur in the judge's conclusion of fact. It would serve no good purpose to print a review of the evidence, consisting of the testimony of X-ray experts, as well as of a layman who testified that he saw the man do hard work after he was discharged from the position of watchman.

The judgment appealed from is affirmed.

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GRITTA'S CASE.

IN RE J. M. HARTWELL & D. KNOWLTON.

IN RE FEDERAL MUT. LIABILITY INS. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. June 23, 1920.)
127 Northeastern Reporter, 889.

1. MASTER AND SERVANT—"CHILD OR CHILDREN" IN COMPENSATION ACT, MEANS LEGITIMATES.

The expression "child or children," used in Workmen's Compensation Act, part 2, § 7, cl. (c), as amended by St. 1914, c. 708, § 3, cl. (c), and St. 1919, c. 204, refers only to a legitimate child or children, in view of Rev. Laws, c. 133, § 3.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Child.)

2. MASTER AND SERVANT—ILLEGITIMATE CHILDREN, MEMBERS OF EMPLOYEE'S FAMILY, HELD DEPENDENTS ENTITLED TO COMPENSATION.

Illegitimate children of deceased employee, living with him and his mistress, who had a living husband undivorced, in one family, and in fact dependent on the employee, *held* entitled to compensation under Workmen's Compensation Act, as amended, though their mother was not.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act by Maria S. Gritta, alleged widow, for compensation for the death of Andrea Gritta, the employee, opposed by J. M. Hartwell & D. Knowlton, the employer, and the Federal Mutual Liability Insurance Company, the insurer. Compensation was denied the widow but awarded her children, the award affirmed by the superior court, and the insurer appeals. Decree of the superior court confirming award affirmed.

The second and third rulings requested by the insurer, referred to in the opinion; follow:

(2) On all the evidence, Frances and Andrea Pappalardo [decedent's children], otherwise known as Frances and Andrea Gritta, are not entitled to compensation.

(3) On all the evidence, Frances and Andrea Pappalardo, otherwise known as Frances and Andrea Gritta, were not members of the deceased employee's family.

J. Frank Scannell, of Boston, for appellant.
A. David Epstein, of Boston, for appellees.

CROSBY, J. The record shows that Mary Pappalardo was married in Italy and lived there with her husband; that before she left that country, in 1911, her husband had been convicted of serious offenses and committed to prison for life; that his wife then came to America, met the deceased employee, and later, about September 26, 1913, "went through

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a marriage ceremony, legal in form," with him; and that thereafter the parties lived together as husband and wife.

The single member of the Industrial Accident Board found that in entering into the alleged marriage contract she did so with the belief there was no legal obstacle to it, and that "at no time was any question raised in her mind as to the legality of her marriage, until the present proceedings were begun"; that two children were born, and the parents and children lived together until the employee received an injury which resulted in his death; and, further, that the children were totally dependent upon the deceased.

[1] He also found that the mother is not entitled to compensation under the act; that finding, upon review, has been affirmed by the Industrial Accident Board without appeal. The board also affirmed the finding that the children did not come within the definition of "child or children" as those words are used in St. 1911, c. 751, part 2, § 7, cl. (c), as amended by St. 1914, c. 708, § 3, cl. (c), and St. 1919, c. 204. They must be held to refer only to a legitimate child or children. R. L. c. 133, § 3; Baylis v. Baylis, 207 N. Y. 446, 101 N. E. 176.

After defining the persons who are conclusively presumed to be wholly dependent for support upon a deceased employee, in part 2, § 7, it is further provided in the same section that—

"In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury."

Part 5, § 2, defines dependents as follows:

" 'Dependents' shall mean members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury."

In Cowden's' Case, 225 Mass. 66, at page 67, 113 N. E. 1036, 1037, it was said:

" 'Family' in its usual sense means 'the collective body of persons who live in one house and under one head or management.' Dodge v. Boston & Providence R. R., 154 Mass. 299, 301. That is the significance ordinarily attributed to the word under the act. Kelley's Case, 222 Mass. 538. See Newman's Case, 222 Mass. 563, 568."

See cases cited 19 Cyc. 451, 452, 453.

The board has found that the children were members of the employee's family. that finding is amply supported by the evidence. It would seem plain from the facts recited in the record, that these children from the date of their respective births lived with their mother and the employee until his death; that he supported them and they were a part of his family to the same extent as if their parents had been lawfully married. The deceased employee recognized the moral obligation which rested upon him to support the children and cared for them as his own lawful offspring, and manifestly they were in fact members of his family at the time of his death.

[2] The question remains whether the illegitimacy of these children affects their status as members of the employee's family under the act. It is the contention of the insurer that, as the act does not specifically include illegitimate children as entitled to its benefits, they should not be held to take by implication; and that in the interests of marital morality and sound public policy they should not be held to be members of the employee's family. Considerations of public policy which would prevent a wrongdoer from participating in the benefits of the act ought not to apply to innocent children born out of lawful matrimony; they are not responsible for their existence or status, they have committed no wrong, and they must be supported as the death of the employee has taken from

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them the care and maintenance which they had previously received from him as the head of the family. We are of opinion that upon the facts disclosed by the record they are entitled to compensation under the act.

Although the question has not previously been considered by this court, the conclusion reached is in harmony with that of courts in other jurisdictions where it has arisen under workmen's compensation acts containing provisions similar to our own in this respect. Roberts v. Whaley 192 Mich. 133, 158 N. W. 209, L. R. A. 1918A, 189; Scott's Case, 117 Me. 436, 104 Atl. 794; Piccinim v. Connecticut Light & Power Co., 93 Conn. 423, 106 Atl. 330.

The cases of Bell v. Terry & Tench Co., 177 App. Div. 123, 163 N. Y. Supp. 733, and Scott v. Independent Ice Co. (Md.) 109 Atl. 117, are not at variance with the conclusion here reached. The language of the Workmen's Compensation Acts there construed are materially different from ours, and for that reason need not be considered.

It follows that the rulings 2 and 3, requested by the insurer, could not properly have been made.

Decree affirmed.

HOGAN'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. June 26, 1920.)

127 Northeastern Reporter, 892.

1. MASTER AND SERVANT—FINDING BY ACCIDENT BOARD MUST STAND UNLESS UNSUPPORTED.

A finding by the Industrial Accident Board must stand unless wholly unsupported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT—COMPENSATION CLAIMANT, A TEAMSTER LET TO ANOTHER HELD TO REMAIN IN EMPLOY OF GENERAL EMPLOYER.

Teamster let with team, who received order from foreman of hiring company to go to freight house for wool and deliver it, who was injured while delivering a load at a warehouse while using rope and tackle owned by the consignee, *held* to have remained in the employ of his general employer, having been given only general directions by the hiring company, so that compensation was properly awarded against the general employer.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act by John H. Hogan, the employee, opposed by M. J. McCarthy & Company and another the employers, and the London Guarantee & Accident Company and another, the insurers. Compensation was awarded to be paid by the named insurer, the award confirmed by the superior court, and the insurer appeals. Decree affirmed.

H. S. Avery, of Boston, for insurer.

CARROLL, J. John J. Hogan, the employee, at the time he received the injury complained of was a teamster in the general employ of M. J. McCarthy & Company. On the morning of the accident he drove the

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team from the general employer's stable to the Youlden, Smith & Hopkins' "stand" on Atlantic avenue, Boston, and received an order from the foreman of that company to go to the freight house for some wool and deliver it at the storehouse of the owner. Two loads had been disposed of, and as the employee was delivering the third to the firm of Cordingly & Company at its warehouse on Summer street, he was injured. In unloading the wool a rope and tackle owned by Cordingly & Company were used. The rope was lowered from the building to the wagon by an employee of Cordingly & Company, and Hogan fastened the tackle to one of the bags of wool, which in some way broke away from the fastening and fell upon him. Both M. J. McCarthy & Company and Youlden, Smith & Hopkins were insured. The Industrial Accident Board found that Hogan was in the employ of M. J. McCarthy & Company when injured, and awarded compensation. From a decree of the superior court sustaining this finding, the insurer of M. J. McCarthy & Company appealed.

[1, 2] The question we have to decide is whether the finding of the Industrial Accident Board, that Hogan when injured was in the employ of M. J. McCarthy & Company, was wholly unsupported by the agreed facts and the evidence. The employee received his wages from the general employer, and in the management of the team was its servant. He was doing the work of a teamster under the special employment of Youlden, Smith & Hopkins precisely as he would have done it under his general employment if the owner of the wool had hired the general employer to do the teaming. No specific instructions were given to Hogan by Youlden, Smith & Hopkins as to the manner of delivering or unloading the wool, only the most general directions were given him, he was told to go to the freight house, get the wool and deliver it where ordered; in doing the work of loading and unloading, of transporting and delivering it, he was left entirely to himself, and no further directions were given by Youlden, Smith & Hopkins. It is the ordinary work of a truckman to unload that which he has carried, and it could be found to be within the scope of the authority of the general employer to give specific orders to such driver, as was the employee, as to the manner in which he was to unload the wool. At least in the absence of evidence showing such control by Youlden, Smith & Hopkins, it may be presumed that the authority still continued in the general employer. The case at bar is to be distinguished from Scribner's Case, 231 Mass. 132, 120 N. E. 350, 3 A. L. R. 1178, where the right and exercise of specific control as to the work of the employee passed from the general to the special employer. It might have been found (as it was found by the Industrial Accident Board), that the work which Hogan was doing when injured was within the general control of M. J. MrCarthy & Company, and not of Youlden, Smith & Hopkins; and that the act of the employee at the time of the injury was one in which, under the practice of the parties, the employee continued subject to the direction and control of his general employer, and did not become subject to that of the company to whom he was lent or hired. The case comes within the principle and authority of Clancy's Case, 228 Mass. 316, 117 N. E. 347, and Emack's Case, 232 Mass. 596, 123 N. E. 86; Quinby Co. v. Estey, 221 Mass. 56, 108 N. E. 908; Paulson v. Jarvis, 122 L. T. Rep. 471.

Decree affirmed.

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WHITE v. SLATTERY CO.

(Supreme Judicial Court of Massachusetts. Suffolk. May 20, 1920.)

127 Northeastern Reporter, 597.

4. MASTER AND SERVANT — EMPLOYEE'S FAILURE TO RESERVE UNDER COMPENSATION ACT COMMON-LAW RIGHTS HELD A BAR TO ACTION.

The facts that defendant employer was a subscriber under the Workmen's Compensation Act, and that plaintiff, an injured employee, had not reserved her common-law rights as provided in such act (St. 1911, c. 751, pt. 1, § 5), were a complete bar to plaintiff's cause of action for her injuries at common law, if they arose out of and in the course of her employment.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

5. MASTER AND SERVANT — INJURIES WHILE LEAVING WORK DURING LUNCH HOUR HELD TO "ARISE OUT OF AND IN COURSE OF EMPLOYMENT."

Injuries to female buyer of millinery employed by department store when using its elevator to leave store during lunch hours to buy theater tickets for herself and mother *held* to have arisen out of and in the "course of her employment" within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

6. MASTER AND SERVANT—EMPLOYEE OF SUBSCRIBER UNDER COMPENSATION ACT HELD NOT ENTITLED TO SUE AT LAW, NOT HAVING GIVEN NOTICE.

Plaintiff having been employee of defendant, a subscriber under the Workmen's Compensation Act, and not having given notice necessary under St. 1911, c. 751, pt. 1, § 5, to retain her right to action at law for injuries, injuries having been received and having arisen out of and in course of employment, she could not maintain action at law.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Exceptions from Superior Court, Suffolk County. Lloyd E. White, Judge.

Action by Katherine M. White against E. T. Slattery Company, wherein defendant filed a plea in abatement as well as the general issue. There was a finding for plaintiff on the issue of fact involved in the plea in abatement, and directed verdict for defendant on the general issue, and both parties except. Defendant's exceptions to finding on its plea in abatement sustained, and judgment entered for it; plaintiff's exceptions overruled.

John J. O'Hare and John P. Sylvia, Jr., both of Boston, for plaintiff.

Sawyer, Hardy, Stone & Morrison, of Boston (E. C. Stone and Gay Gleason, both of Boston, of counsel), for defendant.

RUGG, C. J. This is an action of tort wherein the plaintiff seeks to recover compensation for injuries sustained by her in 1912. The plaintiff filed a declaration briefly but adequately setting forth her cause of

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Department 1.

Appeal from Superior Court, Los Angeles County, Curtis D. Wilbur, Judge.

Action by the Massachusetts Bonding & Insurance Company against the Los Angeles Railroad Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

E. B. Drake and Kemp, Mitchell & Silberberg, all of Los Angeles, for respondent.

OLNEY, J. This is an appeal from a judgment for plaintiff in an action for damages sustained by the death of one, Ogan, through the alleged negligence of the defendant. At the time of his death Ogan was employed by a corporation known as Bowles Bros Company, and in the course of his employment was driving a wagon westerly on Pico street in Los Angeles. The defendant operates a two-track electric street railroad on the street, the tracks occupying the middle of the street. Ogan was on the northerly or right-hand side of the street as he was going, and off the tracks. On approaching the intersection of South Union street he turned to the left or south across the tracks as if to turn into South Union street. He was driving slowly, and apparently turned without any signal of his intention and without looking back. His wagon was struck by one of the defendant's cars coming up behind him; he was thrown from the wagon and sustained injuries from which he died. He left a widow and two adult sons. His widow made claim against his employer under the Industrial Compensation Act (St. 1913, p. 279), and the claim was allowed, and was paid by the plaintiff as the insurance carrier for the employer. The plaintiff then brought the present action as subrogated by the Industrial Compensation Act to any right of action against the defendant for Ogan's death.

There seems to be little doubt but that Ogan was guilty of contributory negligence in turning as he did across the defendant's tracks without signal and without looking back. Counsel for the plaintiff do not contend to the contrary. The case was tried for the plaintiff in the lower court chiefly upon the theory that after Ogan had turned and had placed himself in a position of peril, his peril was observed and realized by the motorman of the approaching car in time for him, acting with reasonable promptness under the circumstances, to stop the car and avoid the accident, and he did not do so. It is upon this theory alone that it is sought here to justify the verdict for the plaintiff. If the evidence be sufficient to sustain the verdict upon this ground it is at best but little more than sufficient for that purpose. It is not a case of which it can be said that a verdict for the plaintiff is certainly a just one or that a new trial would reasonably result in another such verdict. In other words it is not a case where it can be said with any certainty that substantial justice has been done and that the result should therefore not be disturbed because of errors which may have occurred in reaching it. There was one substantial error which did occur and which under these circumstances requires a reversal and new trial.

The plaintiff's complaint alleged the fact of Ogan's death through the negligence of the defendant; that he left a widow and two sons of whom the widow was dependent on him for support; that the plaintiff by reason of its payment of the claim of the widow against Ogan's employer had been subrogated to any right of action for his death, and then, as the only allegation of damages suffered, alleged that by reason of Ogan's death, his widow had been damaged in the sum of $10,000.

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There was no allegation of damage to the sons nor of facts from which such damage might be inferred. The complaint, also, in alleging the right in the plaintiff by way of subrogation to maintain the action alleged it to be to maintain an action for all damages suffered by the widow without mention of any damages to the sons. At the trial no evidence was introduced of any relation between Ogan and his adult sons who were not living with him, which showed any pecuniary damage on their part.

[1] In this condition of the pleadings and the evidence the jury were charged that the action was one prosecuted by the plaintiff to recover damages alleged to have been sustained by the widow and sons of Ogan; that the right of the widow and heirs to recover for his death had vested in the plaintiff; that if the jury found for the plaintiff the measure of the recovery which should be allowed was the amount of damages suffered by the heirs; that the jury in fixing damages might consider the relation of the widow and children to their deceased husband and father; and that the fact that the widow and children had been and would be deprived of the comfort, society, and protection of the defendant might be considered in arriving at the pecuniary value of the life of Ogan to his widow and children.

In other words, while the complaint alleged and the evidence showed only damage to the widow, the case was unequivocally submitted to the jury as one wherein their verdict, if they found for the plaintiff, should be for the amount of damages suffered by the adult sons, as well as by the widow. The error in so instructing the jury is manifest.

[2] In this connection it may be well to note a claim made by the defendant. It is that since only the widow made claim against Ogan's employer and was alone paid by the plaintiff, the plaintiff's right by way of subrogation was limited to a recovery of the damages suffered by her alone. This is not correct. The making of a lawful claim for compensation under the Industrial Compensation Act works a subrogation of any right of action to recover for his death, whether the person making the claim be the exclusive beneficiary for whom such action would lie or not. Western States, etc., Co. v. Bayside Lumber Co., 187 Pac. 735. The plaintiff, therefore, was entitled to maintain an action for any damages suffered by the sons, as well as by the widow. But the point is that it did not bring such an action. The action it brought was only for damages suffered by the widow. The jury, nevertheless, were instructed that the action was one for damages suffered by the sons, as well as by the widow, and that if they found for the plaintiff they should determine the amount of the verdict accordingly.

[3] The only answer made by plaintiff's counsel to the defendant's claim of error in the respect under discussion is: First, that it appears that the trial court in charging the jury stated, "It is admitted by counsel that for the purpose of this litigation the right of the widow and heirs to recover for the death of the deceased husband and father have vested by operation of law in the plaintiff corporation"; and, second, that attention was not called to the point in argument on motion for a new trial when, in fairness, it should have been. It is argued that, in view of the statement in the charge as to admission by counsel, it must be presumed that such admission was made, even though there be, as there is, nothing in the record showing such admission. We need not decide whether such statement in a charge to the jury proves itself, so to speak, without anything in the record to substantiate it, for, assuming that an admission was made as stated, it was plainly no more than an admission of the subrogation worked by law. It was not an admission that the plaintiiff was entitled to recover for damages suffered by the sons, as well as by the widow. The language quoted itself shows that it was

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not this question, but the matter of subrogation which was in the mind of the court as that which was admitted, and a reading of the balance of the instruction confirms this view.

[4] As to the second contention of plaintiff's counsel, that attention was not called to the point in the argument on motion for a new trial when, in fairness, it should have been, suffice it to say, both that this fact does not appear from the record, but only from counsel's statement, and also that it cannot be said that the right to complain of an error appearing on the record is lost by a failure to call specific attention to it in presenting a motion for a new trial.

Judgment reversed.

We concur: Shaw, J.; Lawlor, J.

WESTERN INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION ET AL. (S. F. 8796.)

(Supreme Court of California. May 12, 1920.)

109 Pacific Reporter, 27.

2. MASTER AND SERVANT—FINDING OF FACTS IN COMPENSATION CASE CONCLUSIVE.

Findings of the Industrial Accident Commission under Workmen's Compensation Act upon questions of fact are conclusive, where there is any substantial evidence to support the award.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — EVIDENCE INSUFFICIENT TO SHOW CONTRACT OF INSURANCE PRIOR TO ACCIDENT.

Evidence of employer in a proceeding under Workmen's Compensation Act as to acceptance of counter offer of the indemnity company on receiving employer's application stating a certain minimum premium *held* not sufficiently definite upon which to base a finding that the employer accepted the counter offer prior to the accident.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

5. MASTER AND SERVANT — FINDING OF AUTHORITY OF AGENT TO BIND INDEMNITY COMPANY BY PAROL HELD NOT SUSTAINED BY EVIDENCE.

In a compensation proceeding involving liability of an indemnity company to an employer of an injured servant, evidence *held* insufficient to support a finding that a local agent of the indemnity company had authority to bind the company by parol from application.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

6. MASTER AND SERVANT—FINDING OF CUSTOM THAT ASSURED WAS COVERED FROM DATE OF APPLICATION NOT SUSTAINED BY EVIDENCE.

In a proceeding under Workmen's Compensation Act, a finding that it was the custom and the practice that an employer was covered by insurance from the date of his application, where the terms of the application

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were not unconditionally accepted by the company, *held* not supported by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Wilbur, J., dissenting.

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding by Ethel Lamb, under the Workmen's Compensation Act, to obtain compensation for the death of her husband, John Lamb, opposed by M. B. Pond, the employer, and the Western Indemnity Company. There was an award of compensation, and the Indemnity Company brings certiorari. Award annulled.

E. F. Conlin, of San Francisco, for petitioner.

Clarence N. Riggins, of Napa, appearing specially and not otherwise, for respondent Ethel Lamb.

Christopher M. Bradley and A. E. Graupner, both of San Francisco, for respondents.

LAWLOR, J. This is a writ of review issued upon the application of petitioner, the Western Indemnitty Company, a corporation. The Industrial Accident Commission, on April 23, 1918, made an award in the sum of $2,596.14 against the petitioner and in favor of Ethel Lamb, for the accidental death of her husband, John Lamb, an employee of Dr. Pond, of Napa county, it having been found by the commission that petitioner was the insurance carrier of Dr. Pond at the time of the injury. It appears that Dr. Pond had been engaged in operating a small farm and fruit orchard some 10 or 12 miles from the city of Napa. John Lamb was employed on the place as a man of all work, and, although that kind of occupation does not fall within the Workmen's Compensation Act, both Dr. Pond and Lamb nevertheles elected to come under its provisions.

On October 2, 1917, Lamb took a team of horses used on the place to a blacksmith shop in the city of Napa to be shod. About noon, as he was taking the horses out of the shop, they became unmanageable and trampled upon him, inflicting injuries from which he died on October 6.

The principal contention of petitioner is that it was not the insurance carrier of Dr. Pond when the accident occurred, and in this connection petitioner makes the claim that the following findings of the commission are without support in the evidence:

"(6) That prior to the said 2d day of October, 1917, and on or about the 24th day of September, 1917, the defendant M. B. Pond had applied to Arthur H. Smith of Napa, the duly accredited and authorized agent of the defendant Western Indemnity Company, for a renewal of a then expiring policy of insurance covering his liability for injury to his employees, and had requested said agent to procure for him such policy, to take effect upon the expiration of his then existing policy, which would expire on September 25, 1917. That at that time it was the custom and the practice that an assured was covered by the insurance subsequently provided in the policy, from the date of his application. That after the application by said defendant Pond, and before the said 2d day of October, 1917, said defendant Pond was notified by said agent Smith that the premium or rate of said insurance had increased, the exact amount of such increase being at that time not known to said agent. That thereupon said defendant Pond stated his willingness and consent to pay the increased rate, and again requested that the policy be issued. That thereafter, and on or about the 10th day of October,

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1917, the general agents of said Western Indemnity Company duly issued their policy of insurance dated the 25th day of September, 1917, to the said defendant Pond, insuring him against his liability for injuries to his employees, and that on the 10th day of October, 1917, said defendant duly paid to said agent Smith the full premium for said insurance, which premium was duly received and accepted by said agent. (7) That by reason of the facts as set forth in paragraph 6 hereof, the defendant Western Indemnity Company was the insurance carrier of said defendant employer at the time of said injury, and had insured said employer against liability for full compensation for said injury, and said employer is entitled to be relieved from such liability under the provisions of subdivision (e) (2) of section 30 of the Workmen's Compensation, Insurance and Safety Act of 1917."

The evidence will sufficiently appear in the discussion.

Arthur H. Smith, doing business under the name of "Arthur H. Smith & Co.' 'in the city of Napa, was engaged in placing insurance for various companies, including the Western Indemnity Company. Upon the filing by petitioner with the state insurance commissioner of "a duplicate power of attorney" on July 1, 1917, a license was issued to Smith for the term of one year in compliance with the provisions of section 633 of the Political Code. The license gave Smith authority "to solicit applications for insurance or surety bonds or to effect insurance or surety bonds in the name of said company." This power of attorney was not introduced in evidence, but we shall assume that it corresponded with the license.

In September, 1916, Smith secured for Dr. Pond a policy of compensation insurance in "the Massachusetts Company." That policy expired on September 25, 1917. On September 24, 1917, Dr. Pond went to the office of Smith, and "verbally" requested that such policy be "renewed." There is a dispute in the testimony of Dr. Pond and Smith as to whether on this occasion Dr. Pond saw Smith personally or dealt with an employee in Smith's office Dr. Pond testified that—

"Some time in September, I think after the 15th, I received a letter from Mr. Smith stating that my policy terminated * * * asking me * * ' if I wanted a renewal. I gave the letter to Mr. Smith when I went, and ordered a renewal of insurance. I left it as a reminder. * * * He says, 'The premium will be raised.' I was informed that the last premium would be $10 for farmers, and it would be probably $15. * * * Any discussion we had was simply his statement to me that it would be probably not less than $15, and I told him to go ahead. I wanted to be insured even if it was more. He told me right on the start it would probably be that much, 'possibly more,' is the way he put it.'

Smith was asked:

"At the time you took that application from Dr. Pond, was there any question about the issuance of a policy on acconut of the premium—minimum premium "

And he anwered:

"You will have to ask the young lady in the office. She did that work that day. I was not in. * * *"

Smith also testified that the general agent had informed him in a letter of June 29, 1917, that the premium rate for compensation insurance would be $10 "at least temporarily," and that—

"The first notice I had that the minimum premium on farm labor policies had been raised by petitioner was when this application was referred to in this case as being $15."

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Smith stated further that, as the Massachusetts Company had discontinued writing compensation insurance, on September 24 he forwarded to the general agent a written application for coverage for Dr. Pond to begin on September 25, 1917, the application being signed by Smith alone, and in item 14 thereof, opposite the printed words "the minimum premium for this policy," appearing the figures "$10.00." This application was received on September 25 in the office of the general agent, Arthur G. Nason, who conducted the agency as "Arthur G. Nason & Co." In due course Smith received an answer to the application under date of September 26 to the effect that the minimum premium on farm labor policies was $15, and stating:

"We shall hold the application pending receipt of your advices as to whether or not we may write at this rate."

On September 29 Smith wrote to Dr. Pond:

"We are in receipt of a letter from the company stating that the least they can write a compensation policy on farm labor is $15 minimum premium. Kindly advise us by return mail if this is satisfactory to you."

There is a further lack of agreement in the testimony of Dr. Pond and Smith as to what occurred after September 24. Smith testified as follows:

"Q. Did you not see him between September 24 and October 2? A. Me? No. * * * Q. Do you know whether he came to your office during that interval? A. I couldn't say. Q. Was it reported to you that he had been in there? A. No. I don't recall it if it was. * * * Q. Then he didn't answer your letter of September 29 until after the accident on October 2 A. That is right. * * * Q. Did you see him on the afternoon of October 2? A. I did. * * * In my office. * * * He said it would be all right at the $15 premium. * * * Q. When Dr Pond did call on you on October 2 did you then know that this accident had occurred. A. I did."

Dr. Pond's testimony is less definite as to when, after September 24, he talked with Smith about the matter:

"Q. And did you return afterwards to Mr. Smith's office for your insurance policy, * * * and on what date? A. I can't say as to the first time—the date—but I went and had a talk with Mr. Smith, and he said it was all right. * * * Q. When did you go back to Mr. Smith after requesting that he have the policy renewed? Was it before or after October 2d A. Well, my memory is this: that I had another talk with Mr. Smith after ordering a renewal, when he told me that it would be at least $15. 'Well, it might be more,' he said. 'Well,' I said, 'I will draw you a check for $15, it doesn't make any difference. If it is more, I will give you more, and if it is less you can refund it.' He said, 'It would not be less.' On October 2d I called again on Mr. Smith and again tendered money which he refused because he did not know exactly what it would be. He had written me a letter, and I think it was dated the 29th of September, that it would be $15. Whether I called between the 29th and the 2d day of October, the date of the accident, I don't remember positively. Q. But on October 2d, was it after the accident that you called at Mr. Smith's office? A. It was. * * * Q. When did you receive that letter, Doctor? A. I can't tell you exactly. I don't know. Q. But after you received that letter, you called on Mr. Smith, did you not? A. Yes, sir. Q. And that was after the accident had occurred? A. I think I called on Mr. Smith before. I am not positive. I called immediately on receiving the letter. * * * Q. Did you get it before or after the accident. A. I am not positive. I went immediately when I did receive it to Mr. Smith, but I can't say

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positively whether it was before the accident or after. Q. Then, immediately upon receiving the letter—you received it before the accident—you went to Mr. Smith? A. Yes, sir. My impression is that I did. Q. Did what? A. That I did go to Mr. Smith before the accident to tell him it was all right, verbally. My impression is that, but I wouldn't say positively. * * * Q. You are not sure before the accident or after? A. I am not sure. * * * I think so, but I am not positive. Q. You have testified very clearly that you went to Mr. Smith's office after the accident on October 2? A. Yes. Q. But it is not clear in your mind whether you had the conversation at that time with Mr. Smith about the minimum premium of $15 or not A. No, I am not, but mind you, before that Mr. Smith had told me that would probably be $15 and probably more—before that time."

On the afternoon of October 2, after Dr. Pond had called on Smith and they were both aware of the injury to Lamb, Smith wrote the following letter to the general agent:

"In anwer to your favor of the 26th of September in regard to application of Milo B. Pond, would ask that you kindly issue policy at the $15.00 minimum."

No mention of the accident was made in this letter. On October 3 Smith wrote again to the general agent:

We herewith inclose you report of accident to John Lamb, employed by Dr. M. B. Pond. Kindly give this your attention."

Before the receipt of this letter, and in response to that of October 2, the office of the general agent issued a policy at the $15 rate and dated it October 3. This was received by Smith on October 4. On October 5 he sent the following letter to the general agent:

"We herewith return you policy No. CC-14425, Milo B. Pond, as you have made an error in dating same. Under date of September 24, 1917, we sent you application asking you to issue the policy, and under date of September 26th you wrote us advising us of the increase in the minimum charge and also stating that you would hold the application pending receipt of our advice. Kindly issue this policy from date of application."

No written reply was made to this letter, but Smith testified that the date of the policy was changed from October 3 to September 25, while he was in the office of the general agent on October 8 or 9. From the testimony that follows it would appear that the actual date of this meeting and the alteration of the policy was October 9. A report of the results of the post mortem examination was forwarded from Smith's office to the general agent on the last-mentioned date. On October 10 Dr. Pond paid the $15 premium to Smith, who issued a receipt therefor and delivered the policy to him.

Charles M. Wilson, manager of Nason's office, and head of the indemnity insurance department thereof, testified that Smith himself called at the office in San Frrancisco about October 9, and claimed that Dr. Pond's policy had been incorrectly dated; that on this last-mentioned occasion the witness examined the records of the office, and found that Russell B. Adams, an "underwriter and clerk" in the office, had changed the date of the original application to October 3; that, "as a matter of custom" he, without consulting the general agent or any of his staff, then changed the date of the policy to conform to the time of the receipt of the application—September 25—and delivered the policy with the altered date to Smith. Wilson then knew that "Dr. Pond had an accident to one of his employees."

Nason himself testified that he did not learn of the accident until "'after October 3. * * The first that came to my attention was that I was informed that the claim adjuster was called upon by Mr. Wilson

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to go to Napa to attend the coroner's inquest. * * * That was the first that I knew. * * * Q. As a matter of fact, you are not familiar with the details of your office? A. Absolutely not. Q. You left it to your manager, did you not? A. Yes; unless some trouble arose over a matter I wouldn't interfere at all."

The following testimony was given by Russell B. Adams:

Q. State whether or not on behalf of Arthur G. Nason & Co. you accepted said application * * * from * * * Dr. Milo B. Pond. A. The application was not accepted. Q. Please state what action you took upon the said application. * * * A. On receipt of the application I noted the premium specified was not up to our charge. A letter was written by me to Smith advising of this, and saying the application would be held pending his advices. Q. In acknowledging the said letter from * * * Smith * * * state whether or not it was your intention as representative of * * * Nason * * * to hold * * * Dr. Pond covered under a policy. A. It was not my intention to cover the risk. Q. Please state what your intentions were as to the said application. A. To hold it until advised by our agent as to whether the insurance was desired at the higher rate. Q Was it at any time subsequently to the receipt of the application your intention to bind or consider said application of any force or effect, or as constituting any insurance covering Dr. Pond? A. No. * * * No instructions were ever given me to bind this risk or to write a policy. Q. In issuing a binder for such policy * * * what has been your custom while employed by Nason? A. A record of risks bound was kept by Nason. The name, date covered, and nature of covering was always kept. Q. Please state fully what course you would have taken had you intended * * * to hold Dr. Pond covered under a policy. * * * A. A binder would have been issued and recorded as above; in any case there would have been a record of any covering granted."

The respondents in their reply to petitioner's supplemental brief take a different position with regard to the evidence as to when Dr. Pond expressed his willingness to accept the $15 rate from that stated in their first brief. It is insisted in their last position that—

"At the time of the application for a renewal Dr Pond was told by Mr. Smith that the premium would be raised, and that it would be probably $15 as a minimum. Dr. Pond thereupon informed Mr. Smith that the amount of the premium was immaterial—that he wanted a policy. * * * Respondents contend that this made a complete meeting of minds on the only issue—the premium."

From this it is argued that *the letter of September 29 "was superfluous, and should not in any way be considered* in this cause, for the reason that Smith had already been told by Dr. Pond that he wanted the policy regardless of the amount of the premium." (Italics ours.) In their first brief respondents state that—

"On September 24, 1917, Pond applied to Smith at Napa for a policy. * * * *There may or may not have been some discussion between Smith and Pond * * * concerning the premium * * * at the time the application was made.. It is immaterial.* * * The offer of Dr. Pond when it reached the office of the general agent * * * was refused. * * * The petitioner made a new offer to extend coverage to Dr. Pond * * * at an increased price. * * * This offer of petitioner is contained in the letter to Smith * * * under date of September 26 * * * and in the letter from Smith to Dr. Pond under date of September 29. The offer thus made by petitioner was never at any time withdrawn. Indisputably it was accepted by Dr. Pond * * * *What happened in the interim is of no consequence.*" (Italics ours.)

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We do not agree with respondents, as will appear from our discussion, that the letter of September 29 was "superfluous," or that "it is immaterial" what discussion was had on September 24. One reason for setting forth at length the variant positions of respondents is that our interpretation of the findings on this point may appear more clearly. The use of the relative terms "before" and "after" in the sentence relating to the notification to Dr. Pond of the increased rate precludes the idea that the commission meant to find that there was a meeting of minds on September 24. As already shown, Smith's testimony was that he personally had only one interview with Dr. Pond about the rate—after the accident on October 2. We shall assume, for the purposes of this discussion, that the commission found that Smith did discuss the rate with Dr. Pond on September 24. Dr. Pond is less definite as to the number of times he canvassed the premium rate with Smith, but we think his testimony indicates that he meant to convey the impression that he saw Smith three times: (1) on September 24; (2) on a later date before Smith had received the letter of September 26; and (3) after Dr. Pond had received the letter of September 29—but as to this he would not say definitely whether it was before or after the accident. Indeed, Dr. Pond did not testify definitely to any date except October 2, when he called at Smith's office after Lamb was injured. There is further disagreement in the testimony in that Smith stated that he did not know of the increased rate until he received the letter of September 26, while Dr. Pond claims that the higher premium was discussed when he ordered the "renewal."

[1] We have said that the finding cannot be interpreted to mean that the contract was concluded on September 24, nor do we think it can be ascertained therefrom when, according to the commission, Dr. Pond consented to the rate. And, unless the conjunctive "thereupon" connotates an interval between the notification and the consent, it cannot be determined whether the commission found that the rate was agreed upon before or after the injury. Do the findings refer to the second occasion mentioned in Dr. Pond's testimony? The plausible theory is that they do. The word "thereupon" could properly have reference only to an occasion where there was at once a proposal and an acceptance. The term would not describe either of the other occasions. Considered in connection with the statement that he "again" requested that the policy be issued, "thereupon" indicates that he accepted the rate immediately, and "again" connects up with the original request for a "renewal." And, as further supporting this theory, is the circumstance that, according to the same finding, Smith did not then know what the amount of the premium would be. We think it clear that the finding does not refer either to the first or to the third occasion mentioned in the testimony of Dr. Pond. The word "thereupon" could not allude to the interval—however brief it may have been—between the receipt by Dr. Pond of the letter of September 29 and the interview which followed in Smith's office. Moreover, it is shown by the letter of September 29 that when Smith sent it he did know "the exact amount of such increase." It is also to be noted that in the sentence we are discussing the phrase found in the preceding sentence—"and before the 2d day of October"—is significantly missing. In our opinion it was important for the commission to find whether Dr. Pond accepted the rate on the first, the second, or the third of these occasions, for if it was upon the first or second occasion we should be obliged to declare that the findings are not supported by the evidence. Upon the receipt of the application, whatever the scope or extent of Smith's authority may have been—and we shall consider this later—the matter of the rate was taken out of his hands by the letter from the general agent of September 26, which constituted a counter offer. So that, up to the time Dr. Pond accepted the counter offer, there was no meeting of minds on one of the elements of the con-

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tract. This would be true even if the testimony of Dr. Pond was accepted by the commission that he stated on the first occasion he wanted the insurance, though the premium might be more than $15, or when he was in Smith's office on the second occassion, for upon the counter offer he was called upon either to accept it or to reject it definitely. We must conclude, therefore, that the commission based its findings on the first or second occasion, or both, and not upon the period following the receipt by Dr. Pond of the letter of September 29, although if the findings did relate to the last occasion we are not to be understood to say that the evidence would be sufficient. We are fortified in this conclusion by the testimony of Dr. Pond himself. He admits that he went to Smith's office *after* the injury. He does not say that he called at any other time on October 2, or that he was in the office more than once after he got the letter. Nor is his testimony definite as to whether he received the letter before or after the accident. We are not losing sight of his testimony that he reported to Smith "immediately" on receipt of the letter; that he thought he received it and saw Smith before Lamb was hurt; that on the second occasion he offered and Smith refused his check; that his purpose in going to Smith's office on October 2 was again to tender the premium and receive the policy; and that "I did go to Mr. Smith before the accident to tell him it was all right verbally.' But, in any event, in our opinion the evidence would not support a finding that Dr. Pond accepted the rate at any time prior to the afternoon of October 2.

[2, 3] It is well settled that the findings of the commission upon questions of fact are conclusive where there is any substantial evidence to support the award. Western Indemnity Co. v. Pillsbury et al., 172 Cal. 807, 159 Pac. 721; Mass. B. & I. Co. v. Industrial Accident Commission, 176 Cal. 488, 168 Pac. 1050. Upon the question of fact we have been discussing, however, taking into account all the pertinent evidence bearing on the point, the apparently consistent and convincing testimony of Smith—supported as it is by the correspondence and the sequence and import of events concerning which there is no dispute, the uncertain testimony of Dr. Pond in most particulars—especially in respect to the time when he acted upon the letter of September 29, and the lack of clearness and definiteness in the findings on the conflict in the evidence—if it can be said that the evidence is really involved in conflict as to the time of his acceptance, we are constrained to declare that, even if the findings are to be interpreted as meaning that Dr. Pond had accepted the counter offer prior to the accident, they are, nevertheless, without support in the evidence. We are not prepared to say, however, that if Dr. Pond had, with some regard for certainty and precision, fixed his acceptance as of a time prior to the casualty we would set aside the finding. We do not think that his testimony can be said to contradict that of his own witness, Smith, on the point that it was sufficiently definite to raise a conflict, or, if there was a conflict, that the findings in any true sense resolved it.

[4] Having reached the conclusion that a contract was not concluded prior to the injury, we shall now dispose of petitioner's objection to the finding that Smith was the agent of the company in the transaction. It is claimed in the brief of petitioner that—

"Smith had not been given, and did not have and never attempted to exercise any power or authority over the policies of the company, except to receive and deliver the same, * * * and at no time did he have or claim that he had the right to fix the rate or to execute, issue, sign, countersign, or modify a policy issued by this company. * * *"

Smith testified that he was the agent of petitioner, and not of Dr. Pond. If this be true it might be held that if Dr. Pond had, prior to the

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accident, notified Smith of his acceptance of the counter offer the contract would thereupon have been completed, notwithstanding that Smith did not communicate such acceptance to his principal before the loss occurred. "If the applicant accepts the terms granted by the company the contract is considered complete, without waiting for the local agent to communicate the acceptance to the company." Cooley, Briefs on Insurance, vol 1, p. 424. See, also, Tayloe v. Merchants', etc., Co., 50 U. S. (9 How.) 390, 13 L. Ed. 187; Carter v. Bankers' L. I. Co., 83 Neb. 810, 120 N. W. 455; Joyce on Insurance, vol. 1, p. 230. But on this question it must be kept in view, as tending to show that in the mind of at least one of the parties the contract was not complete, that Smith waited until he heard from Dr. Pond concerning the counter offer before ordering the policy, and that when he did hear from him he promptly notified the general agent.

[5] It is to be noted, however, that the commission did not in its findings determine the character and scope of Smith's authority as agent for petitioner, and this renders it necessary next to consider whether he could bind petitioner by a parol contract of insurance. Smith testified that "binders" were used in San Francisco, but not in Napa; that he issued none in this instance, but that he had been "advised by Mr. Nason and Mr. Wilson * * * that before the policy is issued the applicant is covered * * * from the date of the application." Smith's own position—erroneously assumed, as we shall see—was that coverage was effected from the date of the application, notwithstanding the contract was not completed before the loss. Wilson, when he was asked whether Smith was "authorized to bind the company from the date of the application. * * *" answered, "I don't know." Nason's position was stated as follows:

"Q. Is it your custom during that interim [between the original application and the final acceptance or rejection thereof] to consider the man or the assured covered? A. Not unless a binder is given."

Dr. Pond testified:

"Q. But on October 2d, was it after the accident you called again at Mr. Smith's office? A. It was. Q. And did Mr. Smith at that time tell you that the policy had been applied for or had been issued? A. He told me it had not only been applied for, but I was perfectly secured. * * * Q. Did he tell you positively that he had made application to the insurance company for you to have a policy issued in your favor? A. Showed me a copy of the application. Read it to me to show that I was secured. * * * Q. Doctor, did Mr. Smith tell you you were wholly covered? A. Yes. Q. And you never considered that you did not have any insurance? A. I never questioned it for a moment."

From this testimony it would appear that Smith did not give assurances of coverage to Dr. Pond until after the accident. This is in accord with the former's testimony, for, as already shown, he said he saw Dr. Pond only once—on the afternoon of October 2. Smith also testified that he had not been in the habit of issuing policies for petitioner, and that the invariable custom was to send the applications to the general agency, where the policies were issued and forwarded to him for delivery. We shall assume that Smith was, for certain purposes at least, petitioner's agent; but neither in the testimony we have just quoted, nor elsewhere in the record, is there a particle of evidence to indicate that he had authority to bind petitioner by parol. Hence, even if the commission had meant so to convey by its finding that Smith was "the duly accredited and authorized agent of * * * Western Indemnity Company." and if Smith had given assurances of coverage to Dr. Pond before the injury—and not afterwards—as the fact seems to be, still such a finding would be without support in the evidence.

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[6] We turn now to the question whether the finding "that it was the custom and the practice that an assured was covered by the insurance, subsequently provided in the policy, from the date of his application," may be sustained. We cannot determine from the record whether the commission intended to find that such "custom and practice" was followed as well when the contract of insurance was not concluded before a loss as when it was. If the former, from the conclusion we have already reached as to when the contract was completed, we must hold that the finding is not supported by the evidence. In addition to Smith's testimony that he was advised by the general agent and Wilson that an ap-applicant was covered from the date of his application, he stated that in all the policies he had received from the company, the date corresponded with that of the application, but he admitted that he had never, except in this instance, sent in an application to petitioner whose terms were not acceptable. Wilson's testimony corroborates that of Smith on the point that the policies sent to him had always borne the date of the application, so as to provide coverage from the beginning, but he does not state that such custom and practice were observed where the terms of an application were not unconditionally accepted by the company. The testimony of Nason and Adams, which we have quoted, tends to show positively that this custom and practice did not prevail in such circumstances. It seems to us that this finding is without support in the evidence.

It only remains to consider whether, where the loss has occurred before the parties had come to an understanding upon the terms of the contract, the general agent has authority to issue a policy so as to cover the uncovered loss. The cause was argued before this court and submitted for decision. The submission was subsequently vacated, and the cause set for further argument upon the questions:

"(1) As to the authority of the general agent of a foreign insurance company after a loss not amounting to a total loss has occurred to the knowledge of the agent, to deliver a policy of insurance antedated so as to cover the loss, there being at the time no binding agreement for the insurance between the insured and the company; and (2) as to the authority in the particular case of Wilson, the employee of the general agent, to make such delivery on behalf of the general agent, assuming that the general agent had himself such authority."

After the above order of resubmission the respondent commission filed a supplemental brief in which, among other points, it is urged that "the actions of the employees of Nason Company were the actions of Nason Company," and in support of the contention the following authorities are cited: International Trust Co. v. Insurance Co., 71 Fed. 81, 17 C. C. A. 608; Mound City Ins. Co. v. Huth, 49 Ala. 529; Electric Ins. Co. v. Fahrenkrug, 68 Ill. 463; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Mayer v. Ins. Co., 38 Iowa, 304, 18 Am. Rep. 34; Bodine v. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566. But we do not deem it necessary to discuss this point, and we shall, therefore, proceed on the assumption that the acts of Wilson and Adams stand as the acts of the general agent just as if Smith had dealt directly with him.

The policy was introduced in evidence, and contained the following provisions:

"K. No assignment or change of interest and no change, waiver, or extension of any of the terms or conditions of this policy shall be valid, unless indorsed hereon and signed by an officer of the company, nor shall notice to any agent or any other person be held to effect a waiver or change in any part of the policy. * * * M. The term of this policy shall be twelve months from October 3, 1917, beginning and ending at

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twelve o'clock noon, standard time, at the assured's business address stated herein."

It is contended by petitioner that as Nason, according to his own testimony, was not an officer of the company, the alteration of the date of the policy was not binding on petitioner, the policy did not cover liability prior to October 3, and therefore petitioner was not the insurance carrier of Dr. Pond at the time of the accident. But, as the decisive question here is whether the general agent had authority to issue a policy covering a known loss, rather than whether he was authorized to alter a policy properly issued in the first place, we are not called upon to discuss the provision in clause K.

[7] The general rule covering this question is thus stated in Cooley's Briefs on Insurance, vol. 1, at page 354:

"It may * * * be regarded as elementary that an agent has no authority to insure goods which he knows to have already been destroyed by fire."

And this rule finds support in the following cases: Mead v. Phenix Ins. Co., 158 Mass. 124 [32 N. E. 945]; Clark v. Ins. Co., 89 Me. 26 [35 Atl. 1008, 35 L. R. A. 276]; Stebbins v. Ins. Co., 60 N. H. 65. And in Waterloo Lumber Co. v. Ins. Co., 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. (N. S.) 539, the court said:

"It has frequently been held that an agent has no authority to insure property already destroyed. * * * "

See, also, Bentley v. Columbia Ins. Co., 17 N. Y. 421; 28 Cent. Dig. p. 703; 11 Dec. Dig. Ins. § 127. The principle laid down in these authorities is equally applicable to compensation insurance.

Whether or not the insurer, under all the circumstances, could have issued a policy which covered the loss—either total or partial—the authorities we have cited sustain the proposition that, unless there is a subsisting contract of insurance when the loss occurs, a general agent, in the absence of express authority, has no power to issue a policy. We think it has been made clear that in this case there was no contract in force at the time of the injury. One was written on the day following the loss, but was never "issued" until it was delivered to Smith on October 9. Before that time the date of the application had been changed from September 25 to October 3, and the policy from October 3 to September 25.

The following cases are cited in the brief filed by the respondent commission in support of the proposition that a general agent has authority to issue a policy covering a known loss and binding on his principal: New York Ins. Co. v. Russell, 77 Fed. 103, 23 C. C. A. 43; Insurance Co. v. Colt, 87 U. S. (20 Wall.) 560, 567, 22 L. Ed. 423; Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298; Schultz v. Phœnix Ins. Co. (C. C.) 77 Fed. 374, 392; Kennebec v. Insurance Co., 6 Gray (Mass.) 204; Warner v. Insurance Co., 14 Wis. 345; Komula v. Gen. Assurance Co., 165 Wis. 520, 162 N. W. 919. These authorities are distinguishable from the case here in that in each of them, prior to the loss, the insured had signified his acceptance of the terms offered by the insurance company, and thus a contract of insurance had been concluded. No authority has been cited, and we are aware of none, holding that a general agent, unless specially authorized, may issue a policy for a known loss, where the terms of the contract of insurance had not already been settled upon.

The general rule is that whenever the parties have entered into a contract before the loss occurs or the policy has been issued, unless the authority of the general agent is expressly delimited, the policy, when issued, by operation of law relates back to the application, and is dated accordingly—the policy being thereafter merely evidence of the contract; but this general rule has no application where the parties were not un-

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der contract at the time of the injury, and the general agent is without special authority to issue a policy to cover the loss.

Since it appears, then, that no contract of insurance was concluded prior to the accident, that Smith had no authority to bind petitioner by a parol contract of insurance, that the "custom and the practice" found by the commission to have been followed did not extend to a case where, at the time of the loss, the parties had not agreed upon the terms of the contract, and that the general agent was, in such circumstances without authority to issue a policy it follows that the findings cannot be sustained.

The award is annulled.

We concur: Angellotti, C. J.; Shaw, J.; Olney, J.; Lennon, J.

WILBUR, J. I dissent. The evidence shows that the Workmen's Compensation Law did not apply to Dr. Pond until, at the soliciation of the agent Smith, he elected to be bound by its terms. The effect of his election was to charge him with responsibility for the injury to his employees under the terms of that law, even if he was wholly without fault, as in this case. Because of such election Dr. Pond evidently intended to keep covered by insurance. Accordingly he notified Smith, petitioner's agent, that he desired an indemnity policy, dating from the expiration of his existing insurance, and that he was willing to pay whatever premium was charged by the company. The petitioner offered its insurance policies for sale to the public generally at a fixed and uniform rate. The terms and provisions of the policy being thus fixed, the question of insurance turned upon the willingness of the prospective policy holder to pay the premium demanded therefor by the company. At the time Dr. Pond applied to Smith for the policy he stated that he was willing to pay the premium, whatever it might be. Instead of communicating this fact to the general agent, Smith inserted in the written application the amount of the premium as $10. This resulted in the complications detailed in the main opinion. The evidence discloses that the company was willing to write the policy, and that Pond was willing to pay the amount of the insurance, and this willingness had been communicated by the one to the other. The whole difficulty arose from the failure of Smith to state in the written application for insurance the fact that Dr. Pond was willing to pay the increased premium. This was not the fault of Dr. Pond. The policy applied for was one dated September 25, 1917, and the policy finally issued and paid for was so dated. Wilson, to all intents and purposes, was the general agent of the company. He conducted the entire business of the general agent, in the name of the general agent, without consultation with him. Upon the insistence of Smith that Dr. Pond was entitled to a policy dated September 25, 1917, in accordance with the custom of the office he issued such a policy so dated, after knowledge of the accident, which policy covered the liability here sought to be enforced. In view of the delay caused by the failure of its agent Smith to communicate to the general agent the facts, namely, the willingness of Dr. Pond to pay the premium asked, which would have resulted in the prompt issuance of the policy, it would seem that common honesty demanded of the defendant that it accept the responsibility due to the delay of its own agent in communicating a correct statement of the actual terms of the application. The finding of the ultimate fact by the commission was that the written policy which by its terms covered the accident was binding by reason of a previous oral negotiation between the parties. I think the evidence is sufficient to justify this finding. Under somewhat similar facts in Eames v. Home Ins. Co., 94 U. S. 621, 24 L. Ed. 298, it was held under the circumstances there stated that the acceptance of the rate by the insured in a communication to the local agent was sufficient to bind the company where the rate had been previously fixed by the general agent, and that, although no policy was ever issued,

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the insurance company was bound. The only difference in the two cases in principle is that in the case at bar the information that the applicant was willing to pay the premium demanded was communicated to the local agent before the premium was fixed by the general agent, and in Eames v. Home Ins. Co. it was communicated afterward. In neither case did the information that the applicant was willing to pay the premium demanded reach the general agent in time for the issuance of the policy before the loss, while in Eames v. Home Ins. Co. the policy was never issued, and in the case at bar it was issued with full knowledge of the fact. I think that Dr. Pond had signified his acceptance of the terms offered by the insurance company and thus a contract of insurance had been concluded.

SCHILLING v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. (Civ. 3385.)

(District Court of Appeal, First District, Division 2, California. April 21, 1920. Rehearing Denied May 13, 1920.)

190 Pacific Reporter, 373.

1. MASTER AND SERVANT—COMPENSATION ACT AUTHORIZES COMMISSION TO FIX FEES OF CLAIMANT'S ATTORNEYS.

The Industrial Accident Commission has authority, under Workmen's Compensation Insurance and Safety Act, §§ 24(b) (1), and 24(d), to fix the fees of attorneys representing a claimant.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

2. MASTER AND SERVANT — COMPENSATION ACT MERELY AUTHORIZES DETERMINATION OF REASONABLENESS OF ATTORNEY'S FEE.

In fixing the fee of claimant's attorney under Workmen's Compensation Insurance and Safety Act, §§ 24(b) (1) and 24(d), the jurisdiction of the Industrial Accident Commission is confined to determination of the reasonableness of the fee for the services in the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for services in independent proceedings, though the contract is made payable out of the award of compensation made by the commission.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

3. MASTER AND SERVANT — COMPENSATION COMMISSION BOUND TO GIVE ATTORNEY FAIR HEARING ON QUESTION OF REASONABLENESS OF FEE.

If a claimant under the Workmen's Compensation, Insurance, and Safety Act, who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered, seeks to avoid the obligation of the contract after the services have been rendered and the profits retained by him, the attorney is entitled to a fair hearing before the commission on the question of the reasonableness of the fee agreed to be paid

(For other cases, see Master and Servant, Dec. Dig. § 420.)

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Proceeding by John B. Costello under the Workmen's Compensation Act to obtain compensation for personal injuries. Application by Frank Schilling for certiorari to review an order of the Industrial Accident Commission fixing his compensation for legal services. Order annulled.

Frank Schilling, of San Francisco, pro se.
A. E. Graupner, of San Francisco, for respondents.

PER CURIAM. Petitioner instituted this proceeding in certiorari to review the order of the Industrial Accident Commission fixing his compensation, after rehearing, for legal services rendered to an applicant for compensation under the provisions of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831).

It appears from the record that the applicant, having been injured while in the course of his employment, consulted petitioner, who is an attorney at law, and through his advice and counsel procured temporary compensation from the insurance carrier; that thereafter he obtained other employment, during the course of which he was again injured and again cousulted petitioner; and that thereafter, as the result of further consultation with petitioner, he was advised that he might apply for permanent compensation as the result of the first injury upon medical testimony which it was deemed possible to procure at that time. This application was made through the advice and assistance of petitioner, and a partial hearing was had thereon before the commission, wherein the evidence was very unfavorable to the applicant; but thereafter, through the advice and activities of petitioner a settlement was made with the insurance carrier for $650, which was approved by the commission and subsequently paid. It further appears that at the time of the approval of this settlement the commission fixed the compensation for petitioner's legal services at $45 without a hearing; that at the request of petitioner a rehearing was granted by the commission for the purpose of determining the reasonableness of the order fixing such fee. Petitioner claimed that he had an oral contract with the applicant for the payment of one-third of the amount recovered from the insurance carrier, which amount included payment for legal services rendered by him to the applicant in matters not directly connected with the proceeding in which the recovery was had. He insisted that this contract should not be declared void in toto, and that in any event the allowance of $45 was wholly unreasonable in payment for the legal services which he had rendered in the proceeding before the commission.

As disclosed by the record filed by respondent herein, the attitude of the referee to whom the rehearing had been referred by the commission was extremely hostile and prejudicial to petitioner throughout the entire proceedings. Immaterial and irrelevant testimony was taken for the purpose of attacking the professional standing of petitioner; the referee took petitioner's witnesses out of his hands conducted their examination in his own way, refused to permit petitioner to cross-examine witnesses who were antagonistic to him, and studiously obstructed petitioner in his attempts to produce testimony favorable to his cause.

[1, 2] Counsel for respondent states that there is but one question involved in this proceeding, "What was the value of the services performed by petitioner, * * * " or "Has the Industrial Accident Commission authority under sections 24 (b) (1) and 24 (d) of the Workmen's Compensation, Insurance, and Safety Act, to fix the fees of attorneys representing applicants before it?" This court is unable to determine the value of the services performed by the petitioner because the referee to whom that matter was referred for adjudication failed to give petitioner a fair opportunity to make proof of such value. That the Industrial Accident Commission has authority under the sections cited to fix fees

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can scarcely be questioned. Section 24, subdivision (b) (1), authorizes the commission to fix and determine a reasonable attorney's fee for legal services pertaining to any claim for compensation or application filed therefor. No constitutional objection has been raised to this provision of the act, and it may therefore, in this proceeding be taken for granted that the power is one which the commission may lawfully exercise. Subdivision (d) of the same section provides that "no claim or agreement for the legal services or disbursements * * * in excess of a reasonable-amount, shall be valid or binding in any respect, and it shall be competent for the commission to determine what constitutes such reasonable amount." No constitutional objection has been raised to this provision of the act, and for the purpose of this proceeding it also may be assumed to be valid. But it must be evident that if the obligation of a contract to pay for legal services, which has been executed by parties legally competent to contract, is to be impaired by the order of the commission solely on the ground that it is unreasonable, some semblance of a judicial hearing must be accorded the contracting parties before such order is made. Furthermore, the jurisdiction of the commission is confined to the determination of the reasonableness of the fee to be paid to counsel for the legal services rendered to the applicant in connection with the proceedings before it, and does not extend to the determination of the legality of a contract for the payment for legal services rendered in independent proceedings, even though such contract is made payable out of the award of compensation made to the applicant by the commission.

[3] An applicant for compensation is entitled to be represented by counsel in proceedings before the commission. There is no odium attached to counsel who render such services. Though the efforts of the commission to protect the interests of applicants for compenstion are highly commendable, it is just as important that other persons coming within its jurisdiction be treated with equal justice. If a party who has entered into a contract employing an attorney and agreeing to pay him compensation for the services to be rendered seeks to avoid the obligation of such contract after the services have been rendered and the benefits retained by him, the attorney is entitled to a fair and impartial hearing before the commission on the question of the reasonableness of the fee which the contracting parties had agreed should be paid.

That petitioner in this case did not receive such a hearing is too plain to question. The award of $45 as compensation to petitioner for the services admitted to have been rendered by him in the proceedings before the commission is less than the ordinary charge made by attorneys for the collection of a promissory note without any form of legal proceedings. Upon the meager showing petitioner was permitted to make it is apparent that the fee allowed was unreasonably low for the services rendered. But as heretofore stated, it is impossible for this court to determine what allowance should be made for the services rendered, because the referee failed to permit petitioner to fairly present his evidence on that issue.

For these reasons the order of the commission is annulled.

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SAUNDERS ET AL. v. NEW ENGLAND COLLAPSIBLE TUBE CO. ET AL.

(Supreme Court of Errors of Connecticut. June 10, 1920.)

110 Atlantic Reporter, 538.

1. MASTER AND SERVANT — ENTIRE FINDING AND MEMORANDUM DECISION OF COMPENSATION COMMISSIONER MUST BE READ TOGETHER AS A WHOLE.

On appeal from an award of the workmen's compensation commissioner, the entire finding and the memorandum decision are to be read together as a whole.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT HAS BURDEN OF PROOF.

One claiming compensation under the Workmen's Compensation Act has the burden of proving the statutory essentials of his case, and he must establish by competent evidence that his injuries arose out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT — COMPENSATION COMMISSIONER'S FINDING BASED UPON INFERENCE CANNOT STAND IF UNREASONABLE.

Upon appeal in workmen's compensation case, where an essential finding is based upon inference, if the inference is one which a reasonable man could not draw in a reasonable way the finding cannot stand.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—FINDING OF INJURY IN COURSE OF EMPLOYMENT WITHIN COMPENSATION LAW HELD REASONABLE.

Where a 15 year old girl employed in a factory was accustomed daily to take elevator in going to and from work and in getting material when needed, or in taking finished work to another department, and was killed by a descending elevator, a finding that she was engaged in fulfilling the duties of her employment when killed *held* not an unreasonable inference.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT—ONE FOUND INJURED AT PLACE WHERE DUTY LIES PRESUMED INJURED IN COURSE OF EMPLOYMENT WITHIN COMPENSATION ACT.

In workmen's compensation cases there is a natural presumption that one charged with the performance of a duty and found injured at the place where duty may have required him to be is injured in the course of and as a consequence of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

8. MASTER AND SERVANT—POWERS OF APPELLATE COURT TO WEIGH EVIDENCE IN COMPENSATION CASE DEFINED.

The superior court, on appeal from the findings of the compensation commissioner, does not weigh evidence, but it may determine whether the finding of the commissioner should be corrected or not, or whether there was any evidence to support the conclusions reached.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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Appeal from Superior Court, New London County; Joel H. Reed, Judge.

Proceedings by John Saunders and others under the Workmen's Compensation Act to recover for the death of Genevieve Saunders, opposed by the New England Collapsible Tube Company and others. Finding and award by the compensation commissioner in plaintiffs' favor was set aside by the superior court, and plaintiffs appeal. Reversed with directions.

Frank L. McGuire and Clayton B. Smith, both of New London, for appellants.

Philip Pond, of New Haven, for appellees.

WHEELER, J. The plaintiff's intestate, Genevieve Saunders, 15 years of age, was employed by the New England Collapsible Tube Company on the third floor of its factory. A number of girls worked on this floor with the deceased. The factory building consisted of several floors, and it was necessary for the girls employed in the factory to go from one floor to another for the purpose of getting material as needed, or for the purpose of taking finished work to another department. It was customary for the girls so employed daily to use the elevator for this purpose, and they also used the elevator in going to work in the morning or at noontime and in leaving their place of employment at night.

The decedent used this elevator in this way during the period of her employment with the defendant. On October 24, 1918, and during working hours the decedent left her bench and went to the elevator and leaned her head over the gate, and the elevator descending crushed her head between the top of the gate aand the bottom of the elevator.

No testimony was offered before the commissioner that at the time of her injuries the decedent was about to use the elevator in the course of her employment, or that at this time she had occasion to so use the elevator. The commissioner awarded compensation to the claimants.

The superior court on appeal held that the commissioner erred in holding that the injuries arose out of and in the course of her employment and in requiring the defendants to prove that the injury did not arise out of and in the course of the employment. The court set aside because it could find no evidence from which it could be found that the accident arose in the course of the employment. And the court interpreted the commissioner's finding that "There was no evidence to show that this Saunders girl had reason to use this elevator on this particular day, at this particular hour, nor is there evidence to the contrary," as meaning that there was absolutely not evidence from which the commissioner could find the ultimate fact that the accident arose out of and in the course of her employment.

[1] The entire finding and memorandum of decision are to be read together as a whole. So read, we think it clear that by the words "there is no evidence" the commissioner intended to convey the meaning that there was no testimony, no statement either from a witness or in a written document of this fact, that is, that there was no direct evidence, as it is called in common speech, of this fact. But he did not intend to exclude from consideration the realm of inference and it was in reliance upon the inference to be drawn from facts in evidence that the commissioner reached his conclusion. The court was in error in thinking the commissioner required the employer to assume the burden of proving that the injury did not arise out of and in the course of the employment.

[2] The burden of proof in a claim for compensation under the Workmen's Compensation Act (Pub. Acts 1913, c. 138, as amended by Pub. Acts 1915, c. 288) is upon the claimant to prove the statutory essen-

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tials of his case. He must establish by competent evidence that the injuries for which he seeks compensation arose out of and in the course of his employment. Sponatski's Case, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; Westman's Case, 118 Me. 133, 106 Atl. 532, 535.

What the commissioner did was everyday practice with a trial judge; he found the fact in issue as an inference of fact drawn from other facts in the testimony.

[3] The appeal fairly raises the question whether the inference drawn was unjustifiable. If it was an inference which a reasonable man could not draw in a reasoning way the finding cannot stand, for it would then be so unreasonable as to justify judicial interference. Powers v. Hotel Bond Co., 89 Conn. 143, 93 Atl. 245. No one saw the accident, but that fact is not fatal to a finding of how it occurred It occurred within the period of the employment, at a place where the decedent might reasonably have been, and where her work required her frequently to be. Her duties required her to use the elevator in going from floor to floor for the purposes of her employment. If she was so engaged she was reasonably fulfilling the duties of her employment.

[4] Whether she was so engaged at the time of her injury seems to us an inference which cannot be said to be an inference of a character which the reasonable man could not draw. Is it more likely than otherwise that one injured during the period of employment and in a place where he had a right to be was at this time engaged in her employment, or upon some matter of her own and apart from her employment?

[5] There is a natural presumption that one charged with the performance of a duty and found injured at the place where duty may have required him to be is injured in the course of, and as a consequence of, the employment. We think it more likely than otherwise that the decedent was doing her duty when injured, and that this is a reasonable inference to draw in the absence of evidence to the contrary.

[6] Facts may be found proven of which there was no direct proof, but which are inferences of fact drawn from facts which are in proof. Sliwowski v. N. Y., N. H. & H. R. R. Co., 94 Conn. —, 108 Atl. 805.

[7] It is the duty of the trier to infer what one has done or left undone, although there be no positive testimony of this. And when the appellate court passes upon whether this duty has been judicially performed by legal standard it cannot inquire whether it would have reached the same result; it must limit its inquiry to the ascertainment of whether the inference is so unreasonable as to be unjustifiable. It is the right of every trier to infer what one's conduct has been in the circumstances, even though the inference reaches beyond the positive testimony in the case. Bunnell v. Berlin Iron Bridge Co., 66 Conn. 24, 36, 33 Atl. 533; Union Bank v. Middlebrook, 33 Conn. 95, 100; Dubuque v. Coman, 64 Conn. 475, 479, 30 Atl. 777.

The appellants urge as one ground of error the use by the court of the evidence for the purpose of determining the validity of the award. They say that when the court denied the motion to correct the limited purpose of the evidence had been satisfied. The motion to correct was not filed in the superior court, and hence was not before the court.

The evidence was before the court to enable it to determine whether there was any evidence that the injuries of the decedent arose in the course of and out of her employment. The court held that there was not. "Here," says the court, "the theory that the decedent was injured while on some purpose of her own, outside of her employment, is equally consistent with the theory that she was acting within her employment."

[8] Though this were true, it was the province of the commissioner to determine which theory was supported by the evidence. And if the evidence reasonably supported either theory he might adopt that theory,

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and the superior court on appeal could not disturb his decision upon that ground. The superior court does not weigh evidence in this class of cases; it may determine whether the finding of the commissioner should be corrected or not, or whether there was any evidence to support the conclusions reached. And when it has done this its control over the evidence ceases.

There is error; the judgment is reversed, and the superior court is directed to enter judgment dismissing the appeal from the commissioner and affirming the award.

All concur.

ALDEN COAL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 13150.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 641.

1. MASTER AND SERVANT — "DEPENDENT," WITHIN COMPENSATION LAW, DEFINED.

A "dependent" is one sustained by or relying for support on the aid of another, or looking to another for support and relying on another for reasonable necessaries consistent with the dependent's position in life.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

2. MASTER AND SERVANT — DEPENDENCY QUESTION OF FACT DETERMINABLE BY COMMISSION.

The question of dependency is one of fact, and the court will not interfere with the decision of the commission, if there is evidence tending to sustain it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — MOTHER HELD NOT DEPENDENT ON SON AT TIME OF HIS DEATH.

Where son was managing mother's business, though not for pay, and it did not appear that he was contributing to her support, the fact that she wrote him to come to another state to work for her to help her, and that he was to go after getting money enough, being killed before he could go, did not show she was actually dependent on him at time of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Error to Circuit Court, Fulton County; G. W. Thompson, Judge.

Proceedings under the Workmen's Compensation Act by J. M. Hazlett, administrator, to recover compensation for the death of Arthur Eshelman, employee, opposed by the Alden Coal Company, employer. Award by the Industrial Commission was confirmed, and the employer brings error. Judgment reversed, and record of the Industrial Commission quashed.

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Henry Kueller, for plaintiff in error.

A. W. Kerr and W. J. MacDonald, both of Springfield, for defendant in error.

DUNN, J. The circuit court of Fulton county having confirmed an award by the Industrial Commission of compensation for the death of Arthur Eshelman, the Alden Coal Company, the employer, has sued out a writ of error to review the judgment.

The deceased left no widow or children, but was survived by his mother, Margaret Mohr, and the only question in the record is whether she was partially dependent on his earnings. The employer paid $150 to the administrator for burial expenses, and insists that no further compensation can be awarded under the statute (Laws 1913, p. 335).

Mrs. Mohr was the only witness examined. From her testimony it appears that her husband, the deceased's father, died on June 1, 1915, leaving four children: Arthur, the deceased, who was 18 years old; a brother, Harry, a year or two older; and a brother and sister, who were younger. On or before December 24, 1916, she married Henry Mohr and on that date went with him to Colorado, where they lived together until his death, which occurred on April 30, 1917. After her first husband's death she was the owner of a shoe and harness repair shop in Farmington, which was conducted for her by Arthur and Harry. Arthur received no wages or salary, and lived with his mother, who furnished him with clothes, board, and all his expenses. After Mrs. Mohr's marriage and removal to Colorado, the two brothers continued to conduct the shop until February, 1917, when Harry left, and from that time Arthur ran the shop until June, when it was sold. A payment of $75 was made on the sale, of which Arthur sent his mother $25. The remainder of the purchase price she collected after his death. He never received any compensation for running the shop, except that he paid his living expenses out of the receipts. He never sent her any money, and all the income from the shop was used by her authority to pay the expenses of the two young men, the debts incurred in the business, and an insurance premium on the lives of all the family. When Mohr died, he left, besides his widow, four heirs. He left 160 acres of land, but no money, and no will. Mrs. Mohr had no money or other immediate means of support, and she got Mohr's son to work the farm for half the crop. The only income she received from the farm was what was raised on it, and she got nothing from that source until October, 1917. She bought no clothes, did not have to pay rent, and bought necesary groceries on credit, paying the bills in October out of her receipts from the crops. After Mohr's death she wrote to Arthur to come out in June and work for her, to help her; but he did not want to go until he got a little more money, because he had not enough left after paying the bills. He was to come out after getting money enough, and so he went to work for the plaintiff in error on June 23, 1917, and was killed on July 16.

[1-3] If any compensation beyond $150 for funeral expenses was payable, it was by virtue of paragraph (c) of section 7, which provides for compensation to a parent "who at the time of the injury was dependent upon the earnings of the employee." A dependent is one who is sustained by or relies for support on the aid of another, or looks to another for support and relies on another for reasonable necessaries consistent with the dependent's position in life. The question of dependency is one of fact, and the court will not intefere with the decision of the commission, if there is evidence tending to sustain it. Rock Island Iron Works v. Industrial Com., 287 Ill. 648, 122 N. E. 830. Mrs. Mohr never received any part of her support from her son. Until April 30, before his death in July, she was living with her husband, and was presumably

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supported by him; certainly she was not sustained by the deceased, and did not rely upon his aid for support. She did not look to him for any necessaries of life, and there is no evidence tending to show that she either needed or received aid from him. He was managing her business, though not for pay, and the evidence does not tend to show that he was contributing to her support, rather than that she was contributing to his. After her husband's death she did not become dependent upon Arthur, but provided for herself from her own resources. Had he lived to carry out the arrangement contemplated by his mother and himself, a different question would be presented; but the question here is one of actual dependency at the time of the injury, and evidence of a proposed arrangement which might result in a condition of dependency in the future does not tend to show an actual, existing dependency.

The judgment of the circuit court is reversed, and the record of the Industrial Commission quashed.

Judgment reversed.

HENRY v. INDUSTRIAL COMMISSION ET AL. (No. 13151.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 714.

MASTER AND SERVANT — INJURY WHILE WORKING AT A DIFFERENT MACHINE THAN THAT ASSIGNED DID NOT "ARISE OUT OF AND IN COURSE OF EMPLOYMENT," WITHIN COMPENSATION ACT.

Injury to employee does not "arise out of and in the course of his employment," within Workmen's Compensation Act, where he was set to work at one machine, then worked at another, where he was seen by the foreman, and then, without the employer's knowledge, went to work at a third and different machine, where he was injured.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Carter, J., dissenting.

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under Workmen's Compensation Act by Abe Grossman, opposed by Henry Henry, employer. Award by the Industrial Commission was confirmed, and the employer brings error. Judgment reversed and record of Industrial Commission quashed.

William A. Jennings, of Chicago, for plaintiff in error.
Shaeffer & Foster, of Chicago, for defendant in error.

DUNN, J. Abe Grossman, a young man 18 years old, was injured while working for the plaintiff in error on the first day of his employment, October 9, 1918. On his application the Industrial Commission made an award of compensation to him, which the circuit court of Cook county confirmed. A writ of error to the circuit court has been allowed.

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The only question is whether the injury to the claimant arose out of and in the course of his employment. He was employed to do punch press work, and was put to work by the foreman on a machine called a "kicker," which was operated by foot power and shaped pieces of tin used in the making of tin boxes in forms about four inches long, by turning up about a thirty-second of an inch at the edges Two other machines in the room where the claimant was put to work were also used in the making of the boxes, both of which were power-driven. The first of these (the cutting machine) punched the blanks for making the boxes out of strips of tin three or four feet long. The second was a forming press, which formed the boxes. This machine was guarded so that any one could run it, whether experienced or not, without any danger of getting hurt. It was the former machine by which the claimant was injured. This machine was not so strongly guarded as the other, was dangerous, and required care on the part of the operator to avoid injury.

The claimant testified that he worked on the press the foreman told him to work at about an hour, and completed all the work there was to be done on the kicker before he left it. He did not ask for more work to do on the kicker, but a young fellow whose name he did not know put him to work on the forming press and showed him how to run it This young man worked near him on the kicker, which the foreman had told the claimant to work on. Claimant worked on the forming press until noon and about three hours in the afternoon. The foreman came in and saw him working on this press, but did not say anything to him. About 4 o'clock the claimant had run out of work on the forming press, and the other young man told him to work on the cutting machine. Soon after he began working on this machine the accident occurred, by which the claimant's hand was caught in the machine and crushed, so that the fingers had to be amputated. He was warned by the other employees as to the dangerous character of the machine. The foreman had no knowledge of the claimant's working at this machine, and the young man who told him to work on the cutting machine had no authority to do so, or to control or direct him as to where he should work or what he should do, but, so far as the evidence shows, was merely an employee, with no more authority than the claimant. Another employee, named Gastoria, was in charge of the floor in the absence of the foreman, but there is no evidence that he had any authority to act as foreman or direct the work.

The compensation required by the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i) is only for accidents which arise out of and in the course of the injured person's employment. There is no liability for injury to a workman, unless the workman was at the time of the injury in the performance of some duty for which he was employed, and if a workman voluntarily, and without his employer's direction or acquiescence, undertakes work which he was not employed to do, he is not, as to such work, within the protection of the act. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; International Harvester Co. v. Industrial Board, 282 Ill. 489, 118 N. E. 711. The claimant was employed and put to work at a particular machine. There is no evidence that he was ever told to work at any other machine by any one acting by the authority of his employer. He went of his own will and worked at another machine for a time, and then of his own will again went to a third machine, where he was hurt. If knowledge of the foreman that the claimant was working at another machine would have made the employer liable for an accident happening at such other machine, that rule cannot apply to an injury happening at a third machine, where the claimant, without his employer's knowledge,

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was engaged in other work than that which he had been told to do, and was exposed to risks not incidental to such work.

The judgment of the circuit court will be reversed, and the record of the Industrial Commission quashed.

Judgment reversed.

Carter, J., dissents.

INTERNATIONAL COAL & MINING CO. v. INDUSTRIAL COMMISSION ET AL.. (No. 13083.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 703.

1. MASTER AND SERVANT — LUMP SUM SETTLEMENT UNDER WORKMEN'S COMPENSATION ACT WITHOUT APPROVAL OF INDUSTRIAL COMMISSION VOID.

An injured employee's lump sum settlement for a smaller amount than that awarded him by the arbitrator, made without a petition therefor or approval thereof by Industrial Commission, as required by Workmen's Compensation Act, §§ 9, 23, is void.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

2. MASTER AND SERVANT — EMPLOYER CANNOT RELIEVE HIMSELF OF LIABILITY UNDER WORKMEN'S COMPENSATION ACT BY CONTRACT WITH EMPLOYEE.

An employer cannot relieve himself of liability under the Workmen's Compensation Act by a contract with employee.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

3. MASTER AND SERVANT — COMPENSATION FOR DISFIGUREMENT OF AND ALSO FOR LOSS OF INJURED MEMBER IMPROPER UNDER WORKMEN'S COMPENSATION ACT.

Industrial Commission has no power to award compensation for disfigurement of a member, and also for the loss of the use thereof.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

4. MASTER AND SERVANT--COMPENSATION OR DISFIGUREMENT OF FACE AND HANDS AND ALSO FOR LOSS OF USE OF EYES AND ARMS PROPER UNDER WORKMEN'S COMPENSATION ACT.

Award of compensation for disfigurement of face and hands under Workmen's Compensation Act, § 8, par. (c), does not preclude awarding of compensation for loss of eyes and arms.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

8. MASTER AND SERVANT — EVIDENCE COMPETENT TO PROVE EXTENT OF DISABILITY WITHIN WORKMEN'S COMPENSATION ACT.

In workmen's compensation proceedings involving issue as to percentage of loss of use of employee's injured member, it is competent to prove conditions such as the comparative ability of employee to do certain

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things in the use of the injured member before and after the accident, as well as any other fact which will enable the commission to draw an inference as to the percentage of loss of use of the member.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

10. MASTER AND SERVANT — EMPLOYER HELD NOT ENTITLED TO CREDIT FOR COMPENSATION PAYMENTS UNDER ILLEGAL LUMP SETTLEMENT.

An employer, liable for compensation under Workmen's Compensation Act, is entitled to credit for payments of installments made under the act as they accrued up to the time of the final determination of the award by the Industrial Commission, but is not entitled to credit for payments beyond amount so paid under an illegal lump sum settlement.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

12. MASTER AND SERVANT—ILLEGAL SETTLEMENT MADE IN GOOD FAITH MAY BE CONSIDERED BY INDUSTRIAL COMMISSION ON PETITION FOR LUMP SUM SETTLEMENT.

That an employer, liable for compensation under Workmen's Compensation Act, has in good faith made a lump sum settlement, which is illegal, may be shown on petition to Industrial Commission for lump sum settlement, and may be considered in determining whether settlement should be authorized, and what the amount should be.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Error to Circuit Court, St. Clair County; J. F. Gillham, Judge.

Bill by the International Coal & Mining Company to review proceedings before the Industrial Commission by James Nicholas. Bill dismissed, and complainant brings error. Reversed and remanded, with directions.

R. W. Ropiequet, of Chicago, for plaintiff in error.

A. W. Kerr, of Springfield, and Fred H. Kruger, of Belleville, for defendant in error.

STONE, J. The plaintiff in error filed its bill in equity in the circuit court of St. Clair county to review the proceedings had before the Industrial Commission in the above entitled cause. The circuit court, after hearing, dismissed the complainant's bill for want of equity and confirmed the findings of the Industrial Commission.

Defendant in error, James Nicholas, was injured on February 12, 1918, in the course of his employment as a coal miner in the mine of plaintiff in error, by the premature explosion of powder which he was using in connection with his work. Plaintiff in error and Nicholas were working under the provisions of the Workmen's Compensation Act (Laws 1913, p. 335), and it is admitted that the injury arose out of and in the course of the employment of Nicholas, and that notice was given and claim made within the periods required by that act. Medical aid was furnished by plaintiff in error. It is admitted that the wages of Nicholas were $24 per week. He had no children under 16 years of age. The sum of $115.14 was paid subsequent to the injury and prior to the hearing before the arbitrator on the petition for compensation on the 29th of August, 1918. On hearing before the arbitrator an award was made as follows:

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$18^{8}/_{7}$ weeks temporary total incapacity, at $12	$ 221 14
100 weeks loss of use of left eye, at $12	1,200 00
50 weeks 25% loss of use of left arm, at $12	600 00
30 weeks 15% loss of use of right arm, at $12	360 00
35 weeks disfigurement, at $12	420 00
	$2,801 14

On October 5, 1918, the plaintiff in error petitioned the Industrial Commission for a review of the award so made by the arbitrator, and on the same day secured from Nicholas, in consideration of the payment to him of $1,615.14 and the further paymentt of $204.20 for hospital, medical, and surgical expenses, a release from any and all claims and demands, damages, actions, or causes in action in law or in equity or any and all claims arising under the Workmen's Compensation Act on account of personal injuries resulting or to result from the accident in question. This release was acknowledged before a notary public after having been interpreted to Nicholas by Michael Kakazis. Upon the payment by the plaintiff in error to Nicholas of the consideration mentioned in the release, they agreed that the matters then pending before the Industrial Commission of the state of Illinois should be dismissed. They also stipulated the items that should constitute the basis of such settlement, as follows:

$9^{6}/_{7}$ weeks temporary total disability	$ 115 14
Loss of eye and both arms partially	1,300 00
Disfigurement and medical services	404 20
Total	$1,819 34

Attached to this basis of settlement is the usual final receipt provided for, on a form of the Industrial Commission, for said sum of money, subject to review by the Industrial Commission, and signed by Nicholas.

The cause came on for a hearing before James A. Culp, one of the members of the Industrial Commission, on the above petition for review, on the 12th day of December, 1918. At this hearing for review the plaintiff in error offered in evidence the release signed by Nicholas on the 5th day of October, 1918, the stipulation to dismiss, and the receipt for final settlement, to which Nicholas by his attorney objected, on the ground that the final receipt amounts to a lump sum settlement, which had not as yet been presented to the Industrial Commission, and that the release and stipulation to dismiss, under the circumstances, were matters that could not be agreed upon without the consent of the Industrial Commission.

Some evidence was taken on review touching the facts and circumstances surrounding the execution of the above release and stipulation to dismiss, and the Industrial Commission made its finding and award as follows:

Disfigurement	$420 00
Temporary total disability, $9^{6}/_{7}$ weeks, at $12	116 00
Total loss of use of left eye, 100 weeks, at $12	1,200 00
50% oss of use of right eye, 50 weeks, at $12	600 00
25% loss of use of left arm, 50 weeks, at $12	600 00
15% loss of use of right arm, 30 weeks, at $12	360 00
Total award	$3,296 00

The commission further found that plaintiff in error had paid to Nicholas the sum of $115.14, which should be credited as a payment upon the foregoing installments, and reversed and set aside anything in the

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findings and award of the arbitrator inconsisent with the findings of the commission on review.

[1] It is contended that the Industrial Commission was without jurisdiction, after the filing of the stipulation of plaintiff in error and defendant in error, to dismiss the proceeding; that the effect of such agreement was to deprive the commission of any further jurisdiction.

Section 23 of the Workmen's Compensation Act is as follows:

"No employee, personal representative or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employee, personal representative or beneficiary hereunder except after approval by the Industrial Board."

Plaintiff in error contends that by making the agreement in question here Nicholas waived no legal rights. As we have seen the award of the arbitrator totaled $2,801.14, while the amount paid on the agreement totaled 1,819.34, so that it cannot be said, as a matter of law or fact, that in this settlement Nicholas did not waive any of his rights under the Compensation Act. Furthermore, plaintiff in error required that Nicholas sign a release for any and all claims, demands, damages, causes of action in law or equity, and all claims arising under the Compensation Act on account of his injuries. This release, if valid, includes a release of any right which the claimant had under the Compensation Act for a review within 18 months in case of recurrence of injuries. We are of the opinion that by the agreement, if valid, Nicholas would waive substantial rights accruing to him under the act, amounting to a waiver of provisions of the act in regard to amount of compensation, which such employee has no power to do.

It is urged, however, that one of the purposes of the act is to encourage settlements, and that the Industrial Commission has jurisdiction only where such settlements have not been made. While it is true that one of the purposes of the act is to encourage settlements of claims arising under it, yet such a settlement, in order to be within the contemplation of the act, bust be made in accordance with the terms and provisions of the act; and while it is likewise true that the Industrial Commission will not interfere with such a settlement when made, yet it does not follow that where the Indutrial Commission has taken jurisdiction such jurisdiction can be taken from it by the action of the parties unless such action be in conformity with the act. This, as we view it, was an attempted lump sum settlement on the part of the employer and the employee. Such a settlement must be petitioned for as provided in section 9 of the act, and must be approved by the Industrial Commission.. Schwarm v. Thomson & Sons Co., 281 Ill. 486, 118 N. E. 95; Goelitz Co. v. Industrial Board, 278 Ill. 164, 115 N. E. 875; Forschner & Co. v. Industrial Board, 278 Ill. 99, 115 N. E. 912. As was said by this court in the Goelitz Co. Case:

"The fundamental basis of workmen's compensation laws is that there is a large element of public interest in accidents occurring from modern industrial conditions, and that the economic loss caused by such accidents should not necessarily rest upon the public, but that the industry in which an accident occurred shall pay, in the first instance, for the accident. Harper on Workmen's Compensation, § 5. That lump sum payments, with proper safeguards, should be permitted is obvious, because on the part of the employer it may become necessary for him to terminate all his obligations to his injured workmen and others, and on the part of the employee and his dependents circumstances may arise when to deny such a lump sum settlement would result in great hardship and distress or entire loss of the compensation.. On the other hand, the state is concerned in preventing dissipation of the money paid and an

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early recourse to that charitable aid which systematic compensation aims to avoid."

[2] It is well settled in this state that an employer cannot relieve himself of liability under the Workmen's Compensation Act by a contract with his employee. Tribune Co. v. Industrial Com., 290 Ill. 402, 125 N. E. 351; Chicago Railways Co. v. Industrial Board, 276 Ill. 112, 114 N. E. 534; Wabash Railway Co. v. Industrial Com., 286 Ill. 194, 121 N. E. 569. What was said in these cases with reference to an employer relieving himself in toto from liability under the Workmen's Compensation Act applies with equal force here, where it is sought by the employer to relieve himself partially from said liability. It was said by this court in the Wabash Railway Co .Case, supra:

"Plaintiff in error was operating under the act, and any settlement or agreement made with an injured employee must be considered as having been made under the act, whether so expressly stated or not. It is contrary to the policy of the act to allow an employer, while choosing to come under its provisions by not filing an election in writing to the contrary, to relieve himself from liability under the act by private agreement or contract with the employee."

This language applies with equal force here, where the employer is seeking to limit its liability by settlement in the nature of the lump sum payment. This cannot be done without the approval of the Industrial Commission. Here there was no attempt to secure the approval of the commission, and such agreement could not deprive the commission of jurisdiction. Furthermore, the agreement was disaffirmed by Nicholas when the award made by the arbitrator came up before the commission. The act by section 9 provides the method by which lump sum settlements may be presented to the commission. There was no petition here to have a lump sum settlement made. No evidence was taken as to whether or not it was for the best interest of the applicant that such a settlement should be made. The commission therefore did not err in declining to recognize this settlement and in proceeding to a hearing of the application on review of the award from the arbitrator.

It is also objected that there is no competent evidence to sustain an award for disfigurement; that the scars caused by the powder burns on the neck of defendant in error were not discernible, as they are below the line of his collar; also that there is no competent evidence to sustain disfigurement of the hands. Examination of the record shows that one side of the face of the defendant in error is discolored by many dark blue or black powder marks, and that a noticeable scar was caused by powder burns under the left jaw. Applicant's hands were likewise scarred by powder burns. We are of the opinion that there is evidence in the record upon which to base the award made by the commission for disfigurement. Paragraph (c) of section 8 of the Workmen's Compensation Act provides for compensation for serious and permanent disfigurement of the hand, head, or face.

[3, 4] is urged that the Industrial Commission has awarded compensation for disfigurement and for the loss of use of the same member. The commission has no power to award compensation for disfigurement of a member and also for the loss of use of such member. Wells Bros. Co. v. Industrial Com., 285 Ill. 647, 121 N. E. 256. The record in this case, however, shows that an award was made for disfigurement of the face, while the award for a loss of use applies only to the eyes and arms. This award does not therefore contravene the rule.

[5-7] It is also contended that there is no competent evidence in the record to sustain the award for 50 per cent. loss of the use of the right eye, 25 per cent. loss of the use of the left arm, and 15 per cent. loss of the use of the right arm. An examination of the record discloses that

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while the evidence shows injuries to both arms and powder burns around the right eye, yet the evidence in the record upon which the commission apparently based its finding of the percentage of loss was the opinion of the applicant. It is the rule that a witness, though he be not qualified as an expert, may testify as to his state of health. He may tesify that he is suffering pain or as to his physical condition generally, but he is not allowed to give his opinion that an injury will be permanent. 1 Elliott on Evidence, § 679. As is said in McKelvey on Evidence, p. 218, note 3:

"As a rule, witnesses must state facts and not draw conclusions or give opinions. It is the duty of the jury or court to draw concluions from the evidence and form opinions upon the facts proved."

[8, 9] The determination of the per cent. of loss of use of the right eye and of the arms of the applicant was an issue of the ultimate fact before the arbitrator and commission. Peabody Coal Co. v. Industrial Com., 289 Ill. 449, 124 N. E. 566. It is competent to prove conditions, such as the comparative ability of the applicant to do certain things in the use of the injured member before and after the accident, as well as any other fact which would enable the commission to draw an inference as to the ultimate fact to be determined, but under the rule in this state neither an expert witness nor a law witness may take the place of the commission and declare his belief as to the ultimate fact. Peabody Coal Co. v. Industrial Com., supra; Keefe v. Armour & Co., 258 Ill. 28, 101 N. E. 252, Ann. Cas. 1914B, 188; Yarber v. Chicago & Alton Railway Co., 235 Ill. 589, 85 N. E. 928; Illinois Central Railroad Co. v. Smith, 208 Ill. 608, 70 N. E. 628. The opinion evidence of the applicant was not competent, and there being no other evidence in the record from which the commission could determine the per cent. of loss of the arms and right eye, such finding was error, and the circuit court should have remanded the cause to the commission for a further hearing on that subject.

[10, 11] It is objected by the plaintiff in error that the Industrial Commission erred in not giving it credit for more than $115.14 payments made. While plaintiff in error had no right to make a lump sum settlement, such as was attempted, it did have a right, under the law, to make payment of installments under the act as they accrued, and it is entitled to credit for such payments up to the time of the final determination of the award by the commission. Payments, however, which go beyond this, by means of an attempted lump sum settlement, are, as we have seen, illegal and unauthorized, and, while it might seem harsh to say that the defendant in error here should receive the benefit of such lump sum and yet not be bound thereby, it is a settled rule in this state that the court will not assist either party to an illegal transaction, but will leave them where they have chosen to place themselves. Arter v. Byington, 44 Ill. 468; Neustadt v. Hall, 58 Ill. 172; Harris v. Hatfield, 71 Ill. 298; Workingmen's Banking Co. v. Rautenberg, 103 Ill. 460, 42 Am. Rep. 26. As was said by this court in Goodrich v. Tenney, 144 Ill. 422, 33 N. E. 44, 19 L. R. A. 371, 36 Am. St. Rep. 459:

"It is not enough that the parties may have intended no wrong, or that the testimony produced in the case may have been true. It is the tendency of such contracts to the perversion of justice that renders them illegal."

So it may be said here. While this contract may have been entered into in perfect good faith, yet the purpose of the Compensation Act is, as we have said, that the economic loss caused by accidents should not be permitted to rest in any way upon the public, but that it should be absorbed by the industry in which the accident occurs, and, carrying out that purpose, all settlements of this character were by the law placed under the jurisdiction of the Industrial Commission. No lump sum settlement is authorized to be made in any other way, except under the

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jurisdiction of the commission, and any contract that makes such a settlement otherwise is an illegal contract, and this court will not aid in the enforcement thereof, but will leave the parties as it finds them.

[12] We do not here pass upon what should be done in case of a petition for a lump sum settlement, as no such petition is before us. If this settlement was made in good faith and under circumstances showing it to have been for the best interests of both parties, such facts may be shown before the Industrial Commission upon a petition for a lump sum settlement, should such be presented to that body, and would, of course, be matters proper to be considered by the commission in determining whether or not a lump sum settlement should be authorized and what the amount of the same would be.

For the reasons herein expressed the decree of the circuit court will be reversed and the cause remanded to that court, with direction to remand the case to the Industrial Commission for a correction of the award in harmony with the views herein expressed and for a further hearing as to the question of loss of use of the eye and arms if such is desired.

Reversed and remanded, with directions.

OHIO OIL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13254.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter 744.

3. MASTER AND SERVANT—COMPENSATION CLAIM JURISDICTIONAL.

Notice of the employee's injuries to the employer within 30 days and claim for compensation under the act within 6 months are jurisdictional, and an award of compensation cannot be sustained in the absence of evidence of compliance with such requirement of the act.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

4. MASTER AND SERVANT—COMPENSATION CLAIM HELD NOT WAIVED BY VOLUNTARY PAYMENTS.

Where certain payments to an injured employee were not made by his employer under the Compensation Act, but were voluntarily made without reference to the act, the employee's widow is not entitled to maintain her proceeding for compensation under section 24, on any theory of waiver of notice of injury and written claim for compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

5. MASTER AND SERVANT—COMPENSATION CLAIM HELD TOO LATE.

Where an employee was injured, and returned to work for a time, his widow was not entitled, under Workmen's Compensation Act, § 8, par. (d), to 18 months from the time of returning to work in which to file notice of claim with the Industrial Board, being required to do so within 6 months.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Error to Circuit Court, Crawford County; Charles H. Miller, Judge.

Proceeding for compensation under the Workmen's Compensation Act by Cora Brown, administratrix, for the death of William G. Brown,

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her husband, the employee, opposed by the Ohio Oil Company, the employer. Compensation was awarded by the Industrial Commission, the award confirmed by the circuit court, and the employer brings error. Judgment of the circuit court reversed, and record of the Industrial Commission quashed.

M. N. Poe and McCarty & Arnold, of Robinson, for plaintiff in error.
Newlin, Parker & Newlin, of Robinson, for defendant in error.

DUNN, J. This writ of error to the circuit court of Crawford county was allowed for the purpose of reviewing a judgment of that court, which confirmed an award of compensation against the Ohio Oil Company by the Industrial Commission in favor of Cora Brown, administratrix of the estate of William G. Brown, for the death of the intestate, who was her husband. The points argued for reversal are that no notice was given to the company within 30 days after the accident, that no claim for compensation was made within 6 months, and that there is no competent evidence that the deceased was injured in the course of his employment, or that his death resulted from an injury so received.

The deceased was in the employ of the Ohio Oil company, which was engaged in the production of oil from land leased for that purpose in Crawford county, as a pumper. It is claimed that he was injured by being struck in the face by a piece of wood which he was cutting in the course of his employment for the purpose of repairing shackle rods, and that he died from a cancer resulting from this injury. On August 29, 1916, after dinner, he went back to his work, and in a half or three-quarters of an hour his wife went to where he was at work. She testified that she had seen him cutting sticks, and when she came to the place where he was working she found him leaning against the rod line in a dazed condition, his face and hands white, the stick of wood which he had been chopping lying on the ground, and his right cheek scraped under the eye, though the kin was not broken. He remained dazed for a second or more, when he came to, and she asked him what was the matter. She was not permitted to give his answer. No effect on the eye appeared until the next day, when it darakened ,and remained dark for a few days. He went right on with his work. This happened on Wednesday. On Saturday Mrs. Brown went with her husband to the company's tool house, and told John Raglin, the field boss under whom he was working, that he had been injured. The only evidence of the injury or the notice was this testimony of Mrs. Brown, which was objected to as incompetent. In December the eye and face began to swell and the skin was red. The swelling grew worse gradually, but Brown continued at his work until March 22, 1917, when he went to the hospital at Robinson. He was found to have a cancer on the right side of his face, for which he was operated on the following day, and afterward he received treatment there. He returned to work for the company on August 13, 1917, and worked until October 22, when his health finally broke down, and he quit. The plaintiff in error paid him from December 18, 1917, until March 27, 1918, at the rate of $10 per week. It also paid the hospital bill Until October 1, 1917, amounting to $228.50. Brown died on April 2, 1918, from the effect of the cancer. The opinion of two physicians who treated him, given in answer to a question based on the hypothesis that Brown received a blow on the cheek, was that the cancer resulted from the blow.

No claim for compensation was made within 6 months after the accident. In March, 1917, Brown told Lawrence Wagner, farm foreman of the plaintiff in error, what caused the trouble to his eye, and Wagner sent him to Charles Baker, distric foreman, who sent him to the hospital. Some time after the operation, J. T. Lindsay, an attorney representing

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Mr. and Mrs. Brown, talked with W. W. McDonald, a superintendent of the Ohio Oil Company, about Brown's financial condition, and asked him to pay Brown compensation under the Compensation Act. Afterward McDonald told Lindsay that he had taken the matter up with the company and that the company refused to do anything because it was not liable on account of not having been notified, and later that the company said the only thing to do was to institute proceedings before the board. Afterward McDonald came back to Lindsay's office at a time when Mrs. Brown was there. Lindsay told him something of Brown's financial condition, that they were almost destitute, and McDonald said, "Well, I just came over to see about that; Mr. Kerr and I have talked it over; we thought we would do something for him." He did not say how much they were going to pay, or why; but he held out all the time that they were not liable. No contract or settlement was agreed on, and no further reference was made to the Compensation Act. McDonald did not agree to pay any definite amount or for any specific time, but weekly payments of $10 (which exceeded half of Brown's wages, which were $80 a month), were made to him after December 28, 1917, during his lifetime, by the company's cashier, who took receipts for the payments without any reference to the account on which they were paid or to the Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i).

[1, 2] The only evidence of the giving of notice to the company within 30 days after the happening of the accident is the testimony of Mrs. Brown that she heard her husband tell the field boss that he had been injured, and her competency as a witness is objected to because of her relation to the deceased. At common law husband and wife were incompetent to testify for or against one another, and they were also incompetent to testify either during the marriage relation or after its termination by death or divorce, even in suits to which neither was a party, as to any matter knowledge of which was obtained in consequence of the marriage relation. Monakhan v. Green, 265 Ill. 233, 106 N. E. 792. The rule has been modified by sections 1 and 5 of the act in regard to evidence (Hurd's Rev. St. 1917, c. 51); but the exceptions do not apply to any admissions or conversations between husband and wife, or by either with third persons, except in suits between the husband and wife. The rule is founded in public policy, and under this statute the wife has been held incompetent to testify to a conversation of her deceased husband in her presence. Reeves v. Herr, 59 Ill. 81. Mrs. Brown was not a competent witness to the conversation between her husband and the field boss.

[3, 4] The notice within 30 days and the claim for compensation within 6 months are jurisdictional, and an award cannot be sustained, in the absence of evidence of a compliance with these requirements of the statute. Haiselden v. Industrial Board, 275 Ill. 114, 113 N. E. 877; Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496. On June 25, 1918, Mrs. Brown served upon the company a written claim for compensation. This was within 6 months after the last of the weekly payments made to Brown by the company, and defendant in error claims that these payments were made under the provisions of the act, and she is therefore entitled to maintain this proceeding under the last clause of section 24. From the evidence in regard to these payments, which has already been set forth, it is manifest that they were not made under the provisions of the act, but were voluntarily made without reference to those provisions; the plaintiff in error denying its liability and the administratrix and her attorney knowing that it denied all liability.

The case is different from that of Tribune Co. v. Industrial Com., 290 Ill. 402, 125 N. E. 351. In that case, as in this case, no claim for compensation was made within 6 months of the accident, though within

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that time payments of compensation were made while none were made in this case In that case a contract of settlement was made, which was approved by the Industrial Commission under the Workmen's Compensation Act. The agreement of settlement recited that jurisdiction had been lost under the Workmen's Compensation Act, and that the settlement was purely voluntary on the part of the employer, but it was held, following Wabash Railway Co. v. Industrial Com., 286 Ill. 194, 121 N. E. 569, that any settlement or agreement made between an employer operating under the act and an injured employee must be considered as having been made under the act, and is a submission to the jurisdiction of the Industrial Commission, and a waiver as to any question of time limitation then existing, even though the agreement stated to the contrary.

In the present case there was no agreement whatever. The employer, as the claimant's attorney knew, denied any liability, and made no attempt to settle its liability, or any claim made against it, but suggested that the only thing to do was to institute proceedings before the Industrial Commission. Later the employer, through some of its officers, determined not to settle with the employee, but to "do something for him." No contract was made to pay anything—no promise of any amount or for any time. There was nothing for the Industrial Commission to approve or disapprove, and since there was no agreement there was no waiver. The attorney testified that they did not see any use of filing the claim at that time after they were helping him out, and there would have been no use, for the claim was already barred by the lapse of time.

[5] P aragraph (d) of section 8 of the Compensation Act provides:

"In the event the employee returns to the employment of the employer in whose service he was injured, the employee shall not be barred from asserting a claim for compensation under this act. Provided, notice of such claim is filed with the Industrial Board within eighteen months after he returned to such employment, and the said board shall immediately send to the employer, by registered mail, a copy of such notice."

The claim is made that under this provision Brown and his administratrix were entitled to file a claim for compensation at any time within 18 months after August 13, 1917, the date when Brown returned to work after his absence at the hospital. That provision does not apply to this case. Its intention is to extend, for 18 months after his return to work, the right of an employee to maintain an existing claim, and not to grant a right. If an employee, who has been injured and has a right to compensation returns to work for the same employer, the law gives him 18 months in which to file his claim with the Industrial Commission, but does not create in him a new right, which he did not have at the time he returned.

The judgment of the circuit court is reversed, and the record of the Industrial Commission is quashed.

Judgment reversed.

ORIENTAL LAUNDRY CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13152.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 676.

1. MASTER AND SERVANT—CERTIORARI TO REVIEW AWARD OF COMPENSATION BEGUN BY PRÆCIPE.

Within Workmen's Compensation Act, § 19 (f), requiring suit by certiorari to be commenced within 20 days of the receipt of notice of the

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decision of the board, a suit for writ of certiorari was begun by filing the præcipe for the writ.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

2. MASTER AND SERVANT — COMPENSATION ACT CONSTRUED ACCORDING TO INTENTION.

The intention of the Legislature is to be gathered, in construing the Workmen's Compensation Act, from the necessity or reason of the act, and the meaning of the words, enlarged or restricted, according to such intention as ascertained from the consideration of the whole act.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

3. MASTER AND SERVANT—COMPENSATION ACT HELD TO AUTHORIZE ISSUANCE OF ALIAS WRITS BY REVIEWING COURT.

Where the employer filed in time his præcipe for writ of certiorari and scire facias, as required by the Workmen's Compensation Act, the court can thereafter issue alias writs to replace those lost before service on the commission or the employee, though there is no express provision in the statute authorizing alias writs.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

4. MASTER AND SERVANT — COMPENSATION ACT BEFORE AMENDMENT EXCLUDED NONHAZARDOUS EMPLOYMENT, UNLESS EMPLOYER ALSO ENGAGED IN HAZARDOUS BUSINESS FILED NOTICE OF ELECTION.

Before Workmen's Compensation Act, § 3, was amended in 1917 to bring employers in extrahazardous employments automatically under the act without the filing of a notice, an employer operating a steam laundry, which was extrahazardous under the terms of the act as to employees working with the machinery, was not within the terms of the act as to an employee who only solicited orders outside the laundry, unless the employer had given notice of intention to come within the act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding for compensation by Jeanette E. Curtis, employee, against the Oriental Laundry Company, employer. An award of compensation by the Industrial Commission was confirmed by the Circuit Court, and the employer brings error. Reversed.

Ralph F. Potter and Earl D. Hostetter, both of Chicago, for plaintiff in error.

Gustav E. Beerly, of Chicago, and Ellis S. Chesbrough, for defendant in error.

CARTER, J. Defendant in error, Jeanette E. Curtis, made application for compensation for an injury sustained by a fall on an icy sidewalk in Chicago while soliciting laundry business for plaintiff in error. On a hearing under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i) the arbitrator found for the plaintiff in error. On review before the Industrial Commission some additional testimony was heard, and the commission found that the applicant's injury arose out of and in the course of the employment, and that she was entitled to compensation, specifying the amount due her, which award the circuit court confirmed on review, and the case is now here by writ of error.

Plaintiff in error's laundry was operated by and used power-driven machinery. It does not appear that the company had filed with the In-

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dustrial Commission any notice of its application to come within the act. Jeanette E. Curtis, at the time of her injury and prior thereto, was employed by plaintiff in error in soliciting laundry orders from families at a salary of $12 a week. She mailed in the orders as she received them, and called in person at the laundry office each Tuesday night for her salary. On the day of her injury, December 27. 1916, she was walking along Huron street, between Central and Pine avenues, to solicit orders in an apartment building, when she fell to the icy pavement and broke her hip bone, from which injury she was confined to her bed six weeks, and for two weeks longer was obliged to be lifted from the bed to a chair.

Counsel for defendant in error have raised a question of procedure, which should be first determined. The decision on review by the Industrial Commission was dated June 20, 1918. The attorney here of record filed an affidavit in the circuit court May 13, 1919, stating that the files in said cause was turned over to him by the former attorney for plaintiff in error, and affiant had made diligent search in said files for the writ of certiorari and the writ of scire facias issued by the clerk at the time the præcipe was filed on July 9, 1918, but the same could not be located; that they had not been delivered to the sheriff, and had been lost. The same day an order was entered in the circuit court, directing the clerk to issue an alias writ of certiorari and scire facias, and to place the cause at the foot of the workmen's compensation calendar. The alias writ of scire facias to summon the defendant in error was issued May 20, 1919. On June 13, 1919, a special appearance was entered by defendant in error for the sole purpose, of contesting the jurisdiction of the circuit court as to her, and moving, by the same motion, to quash the alias writ of scire facias and the alleged service.

It is argued by counsel for defendant in error that, as this is purely a statutory proceeding, no process can issue, except as provided for in the act; that there is no provision for an alias writ of scire facias or alias writ of certiorari in the act; that it was the intention of the Workmen's Compensation Act that all the process should be served before the return day; and that, as these alias writs were void, the plaintiff in error is without remedy in the procedure pursued. Paragraph (f) of section 19 of the Workmen's Compensation Act (section 144) provides, in part, as follows:

"The circuit court of the county where any of the parties defendant may be found shall by writ of certiorari to the Industrial Board have power to review all questions of law presented by such record. Such writ shall be issued by the clerk of such court upon præcipe. Service upon any member of the Industrial Board or the secretary thereof shall be service on the board, and service upon other parties in interest shall be by scire facias, or service may be made upon said board and other parties in interest by mailing notice of the commencement of the proceedings and the return day of the writ to the office of said board and the last known place of residence of the other parties in interest at least ten days before the return day of said writ; or any party in interest may commence a suit in chancery. * * * Such suit by writ of certiorari or in chancery shall be commenced within twenty days of the receipt of notice of the decision of the board." Hurd's Stat. 1917, p. 1461.

That section also provides for the giving of a bond by the party bringing the suit. A præcipe and bond were filed in the time required by the statute. It will be noted from the quoted provision of the statute that the writ is to be issued upon the filing of a præcipe, and that the suit must be commenced within 20 days of the receipt of the notice of the board's decision. It is true that there is no provision for the issuance of alias writs. All proceedings under the Workmen's Compensation Act are statutory. People v. McGoorty, 270 Ill. 610, 110 N. E. 791. The question

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as to the construction of the statute on this point has not been directly decided by this court. In Fruit v. Industrial Board, 284 Ill. 154, 119 N. E. 931, the question was indirectly under consideration, and the fair inference from the decision is that an alias writ would be authorized under the statute, for it was there held that where the original præcipe was filed within the statutory period, if service was not had according to statute this "necessitated the issuance of the alias writ."

[1] It is argued by counsel for defendant in error that, as an alias writ is not mentioned in the Workmen's Compensation Act, under the reasoning of this court in construing the Attachment Act an alias writ here could not be held authorized. See Pack, Woods & Co. v. Savings Bank, 172 Ill. 192, 50 N. E. 326. and Keeley Brewing Co. v. Carr, 198 Ill. 492, 64 N. E. 1030. In Schroeder v. Merchants' & Mechanics' Ins. Co., 104 Ill. 71, this court said (page 74):

"What is the commencement of a suit? It is not claimed that it is the service of process on the defendant. It is believed that no case can be found that holds the suit is not commenced until service, or appearance of the defendant. We may therefore conclude that jurisdiction of the person of the defendant is not essential to the commencement of a suit. But it is apparent that a suit is not commenced until the court has in some manner acquired jurisdiction of something in relation to the controversy. It must therefore be over the person of the plaintiff, or the subject matter, or both. The court acquires jurisdiction of the plaintiff when he applies for its power and assistance to compel the defendant to render him his rights under the law; but this aid must be sought according to prescribed forms, and under our practice that form requires that he file with the clerk of the court a præcipe for the process he desires. * * * The court clearly has jurisdiction of the plaintiff when he thus invokes its aid. When he thus submits his person to the court, he, by asking its aid, gives the court jurisdiction over the subject matter in controversy."

Attachment proceedings, such as are referred to in the above cases cited by counsel for defendant in error, are instituted upon the filing of an affidavit and bond, instead of a præcipe, and it is the facts set forth in the affidavit at the time of the filing that are grounds for the issuance of the attachment. A writ of attachment performs a double office. It is a summons and an execution, upon which the property of the defendant is seized before judgment. Keeley Brewing Co. v. Carr, supra. The distinction in the grounds for jurisdiction, as illustrated in these decisions and that of the Schroeder Case, supra, is apparent as to the subject-matter and the plaintiff. That there must be jurisdiction is necessary, but the tendency in the workmen's compensation cases in following out the spirit of the act has been to permit the hearing and adjudication of claims with as little delay and formality as is consistent with orderly procedure. The filing of the præcipe should be held to be the beginning of this suit, thus giving the circuit court jurisdiction to review the proceedings of the Industrial Commission. Smith-Lohr Coal Co, v. Industrial Board, 279 Ill. 88, 116 N. E. 656.

[2, 3] The intention of the Legislature in construing this statute is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to such intention as ascertained from a consideration of the whole act. Louisville & Nashville Railroad Co. v. Industrial Board, 282 Ill. 136, 118 N. E. 483. To hold that the circuit court had no authority to enter an order directing alias writs of certiorari and scire facias when there was a præcipe on file, and in view of the proof of loss of the previous papers would, in our judgment, be contrary to the intention of the Legislature and the purposes and wording of the act. The conclusion follows that the

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circuit court did not err in holding that it had jurisdiction under the alias writ.

[4] Counsel for plaintiff in error do not deny that in the business of the Oriental Laundry Company power-driven machinery was used. but contended that, as it had not filed with the Industrial Commission any notice of its election to provide and pay compensation under the act, and as the applicant's injury had no connection with the operation of the machinery, her occupation could not be regarded as extrahazardous under section 3 of the act (section 128). The injury occurred in 1916, and the application for compensation was filed in January, 1917, before the Workmen's Compensation Act was amended to make employers engaged in extrahazardous occupations come automatically under the act without the filing of a notice to that effect. Under such circumstances the reasoning in Marshall v. City of Pekin, 276 Ill. 187, 190, 114 N. E. 497, 499, is applicable here, where it is said:

"An employer who is engaged in an extrahazardous occupation, and who has made no election to come under the Workmen's Compensation Act, cannot be compelled to pay compensation under said act to any employee injured in an occupation not deemed extrahazardous under said act simply because such employer is also engaged in an extrahazardous employment and in which said employee is not engaged."

This court also said in Brennan v. Industrial Com., 289 Ill. 49, on page 51, 124 N. E. 297:

"Because some other employees may have been engaged in some other part of the work that was extrahazardous would not change the character of the defendant in error's employment or bring him within the provisions of the Workmen's Compensation Act."

See, also. to the same effect, Compton v. Industrial Com., 288 Ill. 41, 122 N. E. 872, and Mattoon Water Co. v. Industrial Com., 291 Ill. 487, 126 N. E. 168.

Under the reasoning in those cases and the authorities there cited, the employer not having elected to pay compensation to all his employees, and as the law existing at the time of the accident and application here in question did not bring the employer automatically within the Compensation Act as to such employees, the Industrial Board is without jurisdiction to award compensation to an employee, such as the applicant, whose duties were entirely separate and apart from any work about the laundry or the power-driven machinery operated therein. The evidence shows clearly that the only time the applicant ever came to the laundry was when she went each Tuesday to the office to receive her pay for the orders she had secured. There is nothing in the record to indicate that on such visits she had anything to do with the power-driven machinery or was expected to go near it.

We are not intending to intimate by anything said here that under the present law, which brings employers engaged in extrahazardous occupations automatically under the act, employees engaged in an occupation entirely independent and separate from the extrahazardous employment would come within the act. That question is not involved here and we do not in any way consider or pass upon it, that being unnecessary, as at the time of this accident the act had not been amended, so as to bring employers engaged in extrahazardous occupations automatically under it.

This conclusion renders it unnecessary for us to discuss or decide whether the injury did or did not arise out of and in the course of the employment, as argued by counsel in their briefs.

As the Industrial Commission was without jurisdiction to award compensation to the applicant, the judgment of the circuit court is reversed, and the finding of the commission set aside.

Judgment reversed.

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SLAGO COAL CO. v. INDUSTRIAL COMMISSION ET AL.

(No. 13261.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter. 751.

1. MASTER AND SERVANT—COMPENSATION FOR TEMPORARY PARTIAL INCAPACITY FOR WORK AND FOR PERMANENT PARTIAL LOSS OF MEMBER PROPER.

An employee may recover under Workmen's Compensation Act, § 8, par. (d), for temporary partial incapacity for work, and at the same time recover, under paragraph (e), cl. 17, for permanent partial loss of use of a member, where the partial incapacity arises out of injuries other than those received by the member for which the award for permanent partial loss of use is allowed.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

2. MASTER AND SERVANT — AWARD HELD IMPROPER AS GIVING DOUBLE COMPENSATION.

Where there was no evidence that an employee's temporary partial loss of capacity for work was due to any other injury than the one for which compensation was allowed for permanent partial loss of the use of the right arm, an award for the temporary partial loss of capacity for work, as well as for permanent partial loss of the use of the arm, amounted to double compensation, which the Workmen's Compensation Act does not authorize.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

Error to Circuit Court, Williamson County; D. T. Hartwell, Judge.

Proceeding for compensation under the Workmen's Compensation Act by Frank Kelley, the employee, opposed by the Slago Coal Company, the employer. Compensation was awarded by the Industrial Commission, the award affirmed by the circuit court, and the employer brings error. Judgment modified and affirmed.

Denison & Spiller, of Marion (R. H. Davis, of St. Louis, Mo., of counsel), for plaintiff in error.

STONE, J. Defendant in error was injured while engaged in the occupation of mule driver in plaintiff in error's mine. The defendant in error, according to his testimony, was knocked unconscious and his right eye, shoulder, and chest were hurt. There was a gash or cut over the left eye. His eyesight was not injured. The cut over the eye left a bluish scar three-quarters of an inch long. The findings and the award of the arbitrator were affirmed by the Indutrial Commission and were as follows: The sum of $12 a week for a period of $3^4/_7$ weeks for temporary total incapacity; the sum of $7.50 a week for a period of $8^3/_7$ weeks, under paragraph (d) of section 8 of the Compensation Act (Hurd's Rev. St. 1917, c. 48, § 133), for partial incapacity; the sum of $12 per week for 4 weeks for disfigurement to the face; and the sum of $12 per week for a period of 50 weeks for a 25 per cent.loss of the use of the right arm. The circuit court of Williamson county affirmed the award of the Industrial Commission on review, and the cause comes here on writ of error.

The only contention made by plaintiff in error is that the award is excessive; it being contended that the commission was not authorized,

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under paragraph (d) of section 8 of the Compensation Act, to make an award for partial incapacity when a further award was given under paragraph (e) of said section for a specific loss of 25 per cent. of the use of the right arm, and that therefore the award of $7.50 per week for a period of $8^{3}/_{7}$ weeks was unauthorized.

Paragraph (d) of section 8 of the act authorizes an award where the employee, by reason of injuries sustained, becomes partially incapacitated, in all cases except those covered by the specific schedule as set forth in paragraph (e) of said section. Clause 17 of paragraph (e) of said section authorizes an award for a permanent partial loss of use of a member of the body or the loss of sight of an eye, and plaintiff in error contends that an award of $7.50 per week for $8^{3}/_{7}$ weeks for partial incapacity amounts to double payment for said period; it being argued that the partial incapacity in this case, according to the evidence of the defendant in error, arose solely out of the injury to his shoulder, and that the permanent partial loss of use of the right arm arose out of the same injury.

[1, 2] While an employee may recover for temporary partial incapacity for work, and at the same time recover for permanent partial loss of use of a member, where the partial incapacity arises out of injuries other than those received by the member for which the award for permanent partial loss of use is allowed, yet we are of the opinion that in this case the award was not authorized, for the reason that there is no evidence in the record which tends to show that the temporary partial loss of capacity for work was due to any other injury than the one for which compensation was allowed for permanent partial loss of use of the right arm. The record shows that the defendant in error received a cut over the eye, bruises on the chest, and an injury to the right shoulder. He was allowed for temporary total disability. He was also allowed for disfigurement caused by the cut over his eye. There was no injury to the arm according to the testimony of the defendant in error, and it follows that the permanent partial loss of use of that member must have arisen by reason of the injury to the right shoulder, so that the temporary partial incapacity for work for which the commission awarded the sum of $7.50 a week for a period of $8^{3}/_{7}$ weeks must have arisen out of the same injury which caused the permanent partial loss of use of the right arm. There is nothing in the record from which any other conclusion can be drawn. This award, therefore, amounted to double compensation for a period of $8^{3}/_{7}$ weeks, which the law does not authorize.

The judgment of the circuit court will therefore be modified, and the award corrected, by striking out the allowance of $7.50 per week for the period of $8^{3}/_{7}$ weeks, and, as modified, the judgment will be affirmed.

Judgment modified and affirmed.

HAFER WASHED COAL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13260.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 752.

1. MASTER AND SERVANT—COMPENSATION AWARD HELD NOT JUSTIFIED BY EVIDENCE.

The Industrial Commission is not justified in finding for one party to a compensation proceeding because there is some evidence which, standing undisputed, would justify the finding, nor should it base its

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finding on testimony which all the facts and circumstances show to be untrue.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

2. MASTER AND SERVANT—COMPENSATION AWARD BASED ON CONJECTURE CANNOT STAND.

If in the opinion of the Industrial Commission there was sufficient evidence to justify an award under the Workmen's Compensation Act the Supreme Court is not authorized to set aside the award because it would have reached a different conclusion from the evidence, but a finding based on mere conjecture cannot stand.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

3. MASTER AND SERVANT—COMPENSATION AWARD WITHOUT REQUIRING SUBMISSION TO EXAMINATION BY PHYSICIANS HELD ERRONEOUS.

In view of the circumstances, Industrial Commission *held* to have erred in proceeding to award compensation without requiring the injured employee to submit to examination by physicians, selected by the employer in accordance with the provisions of Workmen's Compensation Act, § 12, or physician selected by the commission in accordance with section 19.

(For other cases, see Master and Servant, Dec. Dig. § 399.)

Error to Circuit Court, Williamson County; D. T. Hartwell, Judge.

Proceedings for compensation under the Workmen's Compensation Act by Wiley Yates, the employee, opposed by the Hafer Washed Coal Company, the employer. Compensation was awarded by the Industrial Commission, the award affirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

Denison & Spiller, of Marion (R. H. Davis, of St. Louis, Mo., of counsel), for plaintiff in error.

A. W. Kerr, of Springfield and George R. Stone, of Marion, for defendant in error.

THOMPSON, J. This writ of error is prosecuted by leave of court to review the judgment of the circuit court of Williamson county confirming an award of the Industrial Commission awarding compensation to Wiley Yates, defendant in error, for a period of 12 days' temporary total incapacity and for a period of 50 weeks for the loss of 25 per cent. of the vision of both eyes, the injuries being sustained while defendant in error was an employee of the Hafer Washed Coal Company, plaintiff in error.

Defendant in error was employed to repair gasoline engines used in the mines of plaintiff in error. About 4 o'clock on the morning of September 10, 1918, defendant in error went to the oil house of plaintiff in error to draw some gasoline. He hung his miner's lamp on a staple about five feet from the barrel of gasoline, and when he had drawn about a gallon the fumes arising from the gasoline caught fire. Defendant in error ran out of the oil house. His shirt sleeves were burned, and he was scorched about the arms and face. He makes some extravagant statements to the effect that his hands, arms, and face were so badly burned that all the skin came off, and that his eyes were so severely burned that now he has only 50 per cent. of his normal vision. The undisputed facts appearing in the record from his testimony and that of other witnesses are that he waited around the mine until after 7 o'clock; that he helped put out the fire, and then washed up and changed clothes;

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that he did not go to the doctor until some time later that morning; that the doctor treated his hands and arms that morning and again 4 or 5 days later; that there are now no scars from the burns anywhere on his body; that he has never consulted any physician regarding his eyes; that he has had no examination by an eye specialist; that he returned to work September 26, and has been paid his regular wages, and has lost no more time as a result of the injury. The employees who were about the mine on the morning of the accident testified that he made no complaint of injury to his eyes, and that they saw nothing wrong with his face or eyes. Dr. B. F. Crain, the physician selected by defendant in error to treat his injuries, testified that defendant in error made no complaint to him regarding injuries to his face and eyes, and that he made no examination whatever of his eyes. He further testified that the injuries to his hands and arms were slight scorches of the skin, with the possible exception of a few spots where the burns went through the skin.

[1] Over the objection of plaintiff in error defendant in error was permitted to express the opinion that he had suffered a 50 per cent. loss of the vision of both eyes. This court is not permitted to review the evidence for the purpose of determining where the preponderance lies, but we are authorized to consider the evidence to determine whether there is any evidence in the record to sustain the finding of the commission. It is the duty of the commission to hear and weigh the evidence and to make its finding for that party in whose favor the evidence preponderates. It is not justified in finding for one party because there is some evidence in the record which, standing undisputed, would justify that finding, nor should it base its finding on testimony which all the facts and circumstances in the record show to be untrue. Exaggerated statements and groundless assertions that have no foundation in fact are not the character of evidence which the law recognizes as worthy to support any legal finding. It was error to permit defendant in error to express an opinion regarding the per cent of his loss of vision.

[2] Defendant further testified that he could not see as well after the accident as he could before; that he could not read by electric light for any length of time because the print became blurred; that if he looked at an object steadily for a time it disappeared; that the wind made his eyes water; and that the light and heat hurt his eyes. This evidence was competent to be considered by the commission in determining that defendant in error had suffered an injury to his eyes, and, if in the opinion of the commission there was sufficient evidence to justify an award, this court is not authorized to set aside that award because it would have reached a different conclusion from the evidence. On the other hand, the finding of the commission cannot be based on mere conjecture, but must have some substantial foundation in the evidence.

[3] It is further urged that the commission erred in not requiring the defendant in error to submit to an examination by an eye specialist. Section 12 of the Workmen's' Compensation Act provides that an employee entitled to receive disability payments shall submit himself for examination to a duly qualified medical practitioner selected by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury and at intervals after the first examination, "for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this act." Hurd's Stat. 1917, p. 1457. We think, on principle, the purpose of the examination is a legitimate and proper one. In the first place, the employer is entitled to obtain from a man of skill an opinion as to the workman's condition for the purpose of determining whether or not he will settle the claim without litigation, and, in the second place,

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if a settlement cannot be reached he is entitled to this information so that he may present it to the arbitrator or Industrial Commission for its consideration in determining the amount of compensation to which the employee is entitled. When the case was called for hearing before the Industrial Commission plaintiff in error requested that this examination be made at its expense by either of two eye specialists suggested by it or by any qualified physician to be selected by the commission. It appears from the statement of attorneys for plaintiff in error to the commission that some two months before the hearing they had requested defendant in error to submit to an examination by Dr. J. M. Keller, and had advanced to him money necessary to cover expenses that would be occasioned by his trip to the office of the physician. The request of the employer for a physical examination of the employee should be made at a reasonable time, and ordinarily before the case is called for a hearing before the arbitrator or the Industrial Commission. Under the circumstances shown in this record we think it was error for the commission to proceed without requiring defendant in error to submit to an examination by physicians selected by plaintiff in error in accordance with the provisions of section 12 of the act or a physician selected by the commission in accordance with section 19 of the act.

The judgment of the circuit court is reversed, and the cause is remanded to the circuit court of Williamson county, with directions to remand the cause to the Industrial Commission for further proceedings in accordance with the views herein expressed.

Reversed and remanded, with directions.

HENRY PRATT CO. v. INDUSTRIAL COMMISSION et al. (No. 13252.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter 754.

1. MASTER AND SERVANT—FATHER EARNING STEADY INCOME HELD NOT "PARTIALLY DEPENDENT" ON SON, WITHIN COMPENSATION ACT.

A father of seven children *held* not partially dependent, under Workmen's Compensation Act, on a son who had contributed some of his earnings to pay for home and a fixed amount for board, where the father earned $18 a week, of which amount he gave his wife $10.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—PARTIAL DEPENDENCY, WITHIN COMPENSATION ACT NOT DEPENDENT ON ABSENCE OF NECESSARIES OF LIFE.

Partial dependency may exist, though evidence shows claimant could have subsisted without contributions of deceased employee, and it is not necessary to show that claimant would have been without the necessaries of life, or without other means of support, as the test is whether the contributions were relied on by the dependent for a living, and existence of dependency is largely one of fact.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

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3. MASTER AND SERVANT—PARTIAL DEPENDENCY, WITHIN COMPENSATION ACT, HELD QUESTION OF FACT.

Whether a mother, who received $10 a week from her husband, was partially dependent on deceased son, under Workmen's Compensation Act, the son contributing fixed sum for board and aiding in paying for home, *held* a question of fact.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

4. MASTER AND SERVANT—FINDING OF PARTIAL DEPENDENCY CONCLUSIVE.

Finding of Industrial Commission that mother of son, killed in course of his employment, was partially dependent on him for support, will not be disturbed on writ of error to circuit court, confirming award of commission.

(For other cases, see Master and servant, Dec. Dig. § 418[6].)

5. MASTER AND SERVANT — INDUSTRIAL COMMISSION MUST DETERMINE PERSONS ENTITLED TO COMPENSATION.

Under Workmen's Compensation Act, where there is no voluntary payment on part of employer, and the Industrial Commission must determine the compensation for death of employee, it is the further duty of the commission to determine the person or persons entitled to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Error to Circuit Court, Cook County. O. M. Torrison, Judge.

Proceeding by Henry Olson and another under the Workmen's Compensation Act to recover for death of Hugo Olson, a son, opposed by the Henry Pratt Company, employer From a judgment of the circuit court, confirming award of Industrial Commission to applicants, the employer brings error. Modified and affirmed.

Frank M. Cox and Albert N. Powell, both of Chicago, for plaintiff in error.

Edward J. Kelley, of Chicago, for defendants in error.

THOMPSON, J. This writ of error is prosecuted by leave of court to review the judgment of the circuit court of Cook county confirming an award of the Industrial Commission awarding compensation to Henry Olson and Ellen Olson, parents of Hugo Olson, an employee of plaintiff in error, who died from an accidental injury arising out of and in the course of his employment. Compensation was fixed at $1,650, payable in installments, in accordance with the provisions of paragraph (c) of section 7 of the Compensation Act (Hurd's Rev. St. 1917, c. 48, § 132). The only question presented is whether the applicants, or either of them, were dependent upon the earnings of deceased within the meaning of the Compensation Act as amended and in force May 31, 1917.

[1] From the testimony of the applicants, the only witnesses before the arbitrator, it appears that the family of Henry Olson consisted of himself, his wife and seven children. He was 54 years old, his wife was 59 years old, and deceased was 29 years old, at the time of his death. The two oldest daughters were married, and, while they lived much of the time with their parents, they were supported by their husbands. The other four children—Emma, 25; Teckla, 24; Lydia, 22; and Walter, 19—were single and lived with their parents. The home cost $2,500 and was paid for in installments of $20 a month. The last installment was paid

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a year or more before the death of Hugo. He contributed toward the payments on the home, furnished materials for painting, papering, and repairing the home, and did the work at odd times. He paid part of the taxes and the coal bills, and paid to his mother $7 a week for board and room. He furnished her spending money and gave here funds with which to buy clothes. It does not appear from the record whether any of the other children paid board or otherwise contributed toward the support of the home. The father was steadily employed at $18 a week. Of this amount he gave his wife $10, which, with the contributions from the children, constituted the fund from which Mrs. Olson paid all the household expenses.

[2] Partial dependency may exist, even though the evidence shows the claimant could have subsisted without the contributions of the deceased employee. It is not necessary to show that the claimant would have been without the necessities of life, nor is it necessary to show that the dependent was without other means of support. Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245; Havey v. Erie Railroad Co., 87 N. J. Law, 444, 95 Atl. 124; Kenney v. City of Boston, 222 Mass. 401, 111 N. E. 47. The test is whether the contributions were relied on by the dependent for his or her means of living, judging this by the position in life of the dependent, or whether the dependent is to a substantial degree supported by the employee at the time of the employee's death. The problem presented by this test is largely one of fact. Miller v. Riverside Storage & Cartage Co. (Mich.) 155 N. W. 462; Rock Island Bridge & Iron Works v. Industrial Com., 287 Ill. 648, 122 N. E. 830; Keller v. Industrial Com., 291 Ill. 314, 126 N. E. 162. In addition to the $8 retained by him from his weekly wages Henry Olson claimed his son contributed largely to his suport. It does not appear what use he made of this money, but, regardless of the use he made of it, we cannot see how it can be said that this father, who was regularly employed, and whose legal duty it was to support his family was dependent upon his son for support.

[3-5] On the other hand, Ellen Olson had no income and was necessarily dependent on some one for support. While her husband was under a legal duty to support her, the question whether she actually received all or a part of her support from her son, and looked to him for such support, is a question of fact, which upon this record is concluded by the finding of the commission that she was partially dependent upon him. Where there is no voluntary payment on the part of the employer, and the Industrial Commission must determine the compensation, it is the further duty of the commission to determine the person or persons entitled to the compensation. Keller v. Industrial Com., supra; Smith-Lohr Cool Mining Co. v. Industrial Com., 286 Ill. 34, 121 N. E. 231. This the commission has failed to do, but the record justifies a finding that Ellen Olson was the only person entitled to compensation.

The judgment is modified by awarding compensation to Ellen Olson only , and, as modified, is affirmed.

Judgment modified and affirmed.

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SPARKS MILLING CO. v. INDUSTRIAL COMMISSION et al.
(No. 13253.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter 737.

1. MASTER AND SERVANT—ACCIDENTAL DEATH, WITHIN COMPENSATION ACT, PRESUMED UNDER CIRCUMSTANCES.

In a proceeding under Workmen's Compensation Act to obtain compensation for death of an employee, whose body was found on the pavement under a window of the mill where he worked, where there is no evidence of suicide or murder, the presumption against the commission of crime is sufficient to support a finding that death resulted from accident.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT—INJURY "ARISING OUT OF EMPLOYMENT," WITHIN COMPENSATION ACT, DENIED.

An injury arises out of employment, within the Workmen's Compensation Act, when the accident results from a risk reasonably incidental to the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT — COMPENSATION CLAIMANT MUST SHOW ACCIDENTAL INJURY ARISING OUT OF EMPLOYMENT.

In a proceeding under the Workmen's Compensation Act to obtain compensation for the death of a servant, the burden is on the claimant to show that death was caused by accidental injury arising out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT — INJURY ARISING OUT OF EMPLOYMENT, WITHIN COMPENSATION ACT, PROVABLE BY CIRCUMSTANTIAL EVIDENCE.

One claiming compensation for death of a servant under the Workmen's Compensation Act may show that death was caused by accidental injury arising out of the employment by circumstantial as well as direct evidence, but an award cannot be based on surmise or conjecture.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

6. MASTER AND SERVANT—EVIDENCE HELD TO SHOW INJURY ARISING OUT OF EMPLOYMENT, WITHIN COMPENSATION ACT,

In a proceeding under the Workmen's Compensation Act to obtain compensation for the death of a mill employee, whose body was found on the pavement under a window of the mill where he had been at work, evidence *held* sufficient to sustain a finding that the injuries resulting in death arose out of the employment.

(For other cases, see Master and Servant, Dec. Dig. §405[4].)

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7. MASTER AND SERVANT — DEATH FROM FALL FROM WINDOW HELD ACCIDENT "ARISING OUT OF EMPLOYMENT," WITHIN COMPENSATION ACT.

Where it was the established custom of mill employees to go to the windows for fresh air when the heated atmosphere became heavily saturated with dust, an employee, who was killed by falling to the pavement below when at the window for fresh air met his death in an accident arising out of his employment, within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Error to Circuit Court, Madison County; Louis Bernreuter, Judge.

Proceeding under the Workmen's Compensation Act by Cora J. May, executrix, to recover compensation for the death of William F. May, opposed by the Spark Milling Company, the employer. There was an award of compensation by the Industrial Commission, which was confirmed by the circuit court, and the employer brings error. Affirmed.

Samuel A. Harper, of Chicago, for plaintiff in error
Gilson Brown, of Alton, for defendant in error.

THOMPSON, J. October 12, 1918, William F. May suffered injuries at the mill of plaintiff in error which resulted in his death. He had been employed by plaintiff in error for about 12 years. At the time of the accident he was employed as a sweeper and cleaner. It was his duty to sweep the floors and clean up the dirt and mill dust, to brush and clean the machinery, and generally to keep the entire mill and its equipment clean. The mill consisted of four floors and a cupola. On the morning of the accident he left home about 6:30, which was his usual time, and went to the mill, where he changed clothes and went to work at 7 o'clock. He talked with Sam C. Willet, second miller, about 7 o'clock, and again about 7:15. Willet saw the deceased cleaning around the machinery on the fourth floor about 7:30. On this floor there is considerable machinery, including four swinging sifters. These sifters work back and forth with sufficient force to knock a man over if he gets in their way. The south end of the room on the fourth floor is 22 feet wide. At this end there are three windows. Across the west window is a table about 3 feet high. The window sill is about a foot high, leaving about 2 feet of the lower half of the window below the table. Immediately outside of this window is the platform of a fire esape, which is about on the level with the mill floor. The middle window on the south side is about 10 feet east of the window just described. Near the west window is a wheat scourer. The west sifter is about 12 feet from the west window and the sifters extend eastward; the east sifter being opposite the east window. One of the sifters extends out to within 2 or 3 feet of the edge of the middle window. There is no table and no fire escape at the middle window. The air inside the mill was usually filed with dust, and it was customary to keep all the windows open when the weather permitted.

The proof shows that the weather was clear and warm on the day of the accident, and while there is no proof that the windows were open before the accident, many wintnesses testify that they found them open immediately after the accident. We think the evidence clearly warrants the finding that the windows were open at the time of the accident. When Willet last saw and talked to deceased, at 7:30 o'clock, the latter was working between the second and third sifters, which would place him practically opposite the middle window. About 8 o'clock May was found lying on the pavement, below and slightly to the east of the west window. No one saw him fall, but Fred Collins stood within 15 feet of the place where he fell. He was attracted by the sound of the body striking the

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pavement, and turned and saw deceased lying on his back, his head toward the mill, and about 6 feet from the wall. He was unconscious, his legs were broken, and his shoulders and face bruised. He did not regain consciousness, and made no statement. The Industrial Commission found that the injury resulting in his death arose in the course of and out of his employment and awarded compensation. On certiorari the circuit court of Madison county confirmed this award. By leave of this court this writ of error is prosecuted to review that judgment.

[1, 2] Only one thing is certain and clear in this case: That William F. May was found in a dying condition, lying on the pavement below the windows of the fourth floor of this mill. There may be at least three theories, any one of which will account for his death. It might have been suicide; it might have been murder; it might have been accident, and such accident may or may not have arisen out of the employment. All who saw deceased on the morning of the accident—his family and his fellow workmen—testify that he was in his usual good spirits, and that so far as was known he had no enemies. There is no evidence of suicide or murder, and therefore the presumption against the commission of a crime is sufficient to support the finding of the commission that this death resulted from accident. Humphrey v. Industrial Com., 285 Ill. 372, 120 N. E. 816; In re Von Ette, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641; Steers v. Dumewald, 85 N. J. Law, 449, 89 Atl. 1007; State v. District Court, 138 Minn. 138, 164 N. W. 582; Bekkedal Lumber Co. v. Industrial Com., 168 Wis. 230, 169 N. W. 561. Where the evidence shows deceased to have been in good health, and there is a complete absence of evidence showing suicide, it must be presumed that the death was accidental. Wilkinson v. Ætna Insurance Co., 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269. Wiscaless v. Hammond, Standish & Co., 201 Mich. 192, 166 N. W. 993.

[3-6] We think it cannot be seriously contended that the injury causing this death did not arise in the course of the employment. The only serious question presented is whether or not the injury arose out of the employment, and this qestion is not without its difficulty. An injury arises out of the employment, within the meaning of our Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i), when the accident results from a risk reasonaably incidental to the employment. Dietzen Co. v. Industrial Board, 279 Ill. 113, 116 N. E. 684 Ann. Cas. 1918B, 764; Mueller Construction Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918E, 891, Ann. Cas. 1918E, 808. The burden was on the executrix to show that the death of May was caused by accidental injury arising out of the employment, and to show it by direct and positive evidence, or by evidence from which such inference could be drawn. Savoy Hotel Co. v. Industrial Board, 279 Ill. 329, 116 N. E. 712; Edelweiss Gardens v. Industrial Com., 290 Ill. 459, 125 N. E. 260. The proof of these facts may be by circumstantial as well as by direct evidence When it is said that the claimant must prove her case, it is meant that she must necessarily prove it by direct evidence, and that somebody actually saw what took place, because in many cases that is impossible. While the commission cannot surmise, conjecture, or guess its conclusion, yet it may draw an inference from proven facts, so long as it is a legitimate inference. Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651. We think that the facts proven clearly warranted the commission in finding that the windows on the fourth floor of the mill were open, that the deceosed was employed at his regular duties on this floor, and that he was either knocked from the middle window by one of the sifters, or that he fell from the fire escape while there recovering from exhaustion caused by the heat and dust inside the mill. Finding, as we do, that there was evidence in the record justifying these conclusions, it necessarily follows that the injuries resulting in this death

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arose out of the employment of deceased. Our conclusion in this regard find support in the following, among other authorities:

In Ohio Building Vault Co. v. Industrial Board, 127 Ill. 95, 115 N. E. 149, a night watchman was found seriously injured. The evidence strongly tended to show that his injuries were the result of a felonious assault. There were no eyewitnesses, and no direct proof as to why the assault was made. We held that the facts justified the conclusion that the assault was made for the purpose of burglarizing the building, and that therefore the injury arose out of employment.

In Peoria Railway Terminal Co. v. Industrial Board, supra, a fireman suffering from a pre-existing disease fell from his engine cab and sustained injuries resulting in his death. We held that the facts justified the inference that the fall, and not the disease, was the proximate cause of the fireman's death.

In Mechanics' Furniture Co. v. Industrial Board, 281 Ill. 530, 117 N. E. 986, a night watchman was found dead upon the premises with a bullet in his body. There were no eyewitnesses to the killing, and there was no direct evidence showing who shot the watchman or the reason for shooting him. We held that the facts and circumstances justified the commission in holding that the shooting was done by a marauder who intended to burglarize the building, and that therefore the injury arose out of the employment.

In Smith-Lohr Coal Mining Co. v. Industrial Com., 286 Ill. 34, 121 N. E. 231, a motorman was found dead on his motorcar, and the car was running without control. On investigation it was found that his neck was broken. His cap was found about a mile away, where the ceiling of passageway was low. There were no eyewitnesses to an accident in that case, and there was no direct proof showing how or where the neck of the deceased was broken. We held that the evidence justified the inference by the Industrial Commission that the head of the deceased had come in contact with the ceiling of the passageway and that his neck was broken by the force of the contact. The decision of the Industrial Commission that his death arose out of the employment was sustained.

In Stephens Engineering Co. v. Industrial Com., 290 Ill. 88, 124 N. E. 869, an employee was found on the ground below the door leading from the bin floor of an elevator. There was a pulley fastened near the top of this door for the purpose of hauling up heavy articles. On the outer wall of the building, near the door was a fire escape. There were no eyewitnesses to the accident, but we held it fair to presume from the evidence that the deceased attempted to swing by the rope carried by the pulley onto the fire escape, and that for some reason he lost his balance and fell to the ground.

In Walsh Teaming Co. v. Industrial Com., 290 Ill. 536, 125 N. E. 331, a truck driver was found pinched beneath the loading platform and the freight elevator. There were no eyewitnesses as to what the deceased was doing at the time of or immediately prior to the accident, but we held that the evidence justfied the holding of the commission that the injury arose out of the employment.

[7] In re Von Ette, supra, a compositor of a newspaper was last seen alive about 11 p. m. At 3:45 o'clock the next morning his dead body was found upon the ground, six stories below the floor where he worked. The evidence showed it to be custom of the employees to go upon the roof of an adjoining building for the purpose of getting fresh air. In deciding whether or not the injury causing Von Ette's death arose out of his employment, the Supreme Judicial Court of Massachusetts said, among other things:

'If this claimant were required to prove affirmatively all the facts and circumstances attending her husband's death by direct evidence, it is plain that her claim would fail; but she is not limited to such proof. *

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* * The accident happened upon the premises of the employer, and we think, in view of the practice which might have been found to exist under which the men went upon the roof for fresh air, that the act of the deceased in going there on a warm night was not necessarily outside of his employment, but could have been found to be incidental thereto."

And so in the instant case it was proven to be the established custom of the men to go to the windows for fresh air when the heated atmosphere became heavily saturated with dust. This case is clearly distinguishable from those cases where the employee was disobeying orders or otherwise misconducting himself.

There is nothing in this record that justifies any other conclusion than the one reached by the Industrial Commission. The judgment of the circuit court is affirmed.

Judgment affirmed.

STEEL SALES CORPORATION v. INDUSTRIAL COMMISSION ET AL. (No. 13251.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 698.

1. MASTER AND SERVANT — APPLICANT FOR COMPENSATION MAY PROVE ACCIDENTAL INJURY BY CIRCUMSTANTIAL EVIDENCE.

An applicant for compensation has the burden of proof that the injury was accidental, but such proof may be made by direct or circumstantial evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

2. MASTER AND SERVANT—INJURIES IN WASHROOM INCIDENTAL TO EMPLOYMENT WITHIN COMPENSATION ACT.

An employee while at work for his employer may go to the washroom for a purpose personal and necessary to himself, and such acts will be considered incidental to his employment, so that compensation may be awarded for accidental injuries received while there.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

3. MASTER AND SERVANT—PARTY TO COMPENSATION PROCEEDING CANNOT OBJECT TO EVIDENCE BROUGHT OUT BY OWN CROSS-EXAMINATION.

On review of an award by the Industrial Commission, an employer cannot object to testimony as hearsay which he brought out by his cross-examination of applicant, where he made no objection or motion to strike it from the record.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

4. MASTER AND SERVANT—"ACCIDENT" WITHIN COMPENSATION ACT DEFINED.

The word "accident," as used in Workmen's Compensation Act, should not be construed technically, but includes every injury suffered in the course of employment, if it can be traced to a definite time, place,

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and cause, and occurred unexpectedly without affirmative act or design of the employee.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Accident.)

5. MASTER AND SERVANT — INJURIES BY BURNING FROM MATCHES CARRIED HELD TO ARISE OUT OF EMPLOYMENT WITHIN COMPENSATION ACT.

Where there was no rule forbidding the carrying of matches, though smoking was forbidden, the commission could find that injuries to an employee caused by the burning of his oilsoaked clothing, ignited accidentally from matches which he carried while he was in the washroom, arose out of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

6. MASTER AND SERVANT—FINDING WARRANTED BY EVIDENCE CONCLUSIVE.

Where there is evidence which warrants an inference that the injury arose in the course of the employment, the court, on writ of error to review an award of compensation by the commission, cannot hold as a matter of law that the accident did not arise out of or in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by John Schwinn, administrator, for compensation for the death of Frederick Schwinn, employee, opposed by the Steel Sales Corporation, employer. An award of compensation by the Industrial Commission was affirmed by the circuit court, and the employer brings error. Affirmed.

Frank M. Cox and Albert N. Powell, both of Chicago, for plaintiff in error.

Harry A. Fleck, of Chicago, for defendant in error.

CARTER, J. Frederick Schwinn, an employee of the plaintiff in error corporation working as a machine hand, went into the toilet room of the building of said company on November 9, 1916, and while there his clothing caught fire, and before it was extinguished he was so badly burned that he died. The arbitrator found the injury did not arise out of the employment. The Industrial Commission found to the contrary and made an award, which was affirmed by the circuit court. The cause is now here on writ of error.

The duties of the deceased were to cut cold steel plates on a cutting machine in the basement of plaintiff in error's plant, his working hours being from 7:30 to 5:30 each day, with half an hour for lunch. He worked on a machine with a fellow employee about 80 or 100 feet from the washroom, which latter room contained lockers for the employees' street clothes and a drinking faucet. A toilet was located in one corner of the washroom, being divided from the rest of the room by a partition extending part way to the ceiling. There was only one window in the room, admitting but little light, and an electric light was suspended from the ceiling just outside the toilet room, but not in such a position as to thoroughly light the same. At the time of the accident deceased had his working clothes on—overalls and an apron but no coat—and the evidence tends to show that his working clothes had become oily from his work. Immediately prior to the accident deceased's brother and two

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other employees were in the washroom. One of them still remained in the washroom when deceased went into the toilet, but at the exact time deceased's clothing was ignited none were near him or where they could see him. He had been in the toilet only a moment when he ran out with his clothing on fire, passing the man in the washroom, then to the basement workroom and on upstairs past his brother, who tried to hold him and throw water on him, and then out into an alley, where finally, after most of his clothing had been burned away, a blanket was thrown around him and the fire put out. The brother of the deceased, on cross-examination by counsel for plaintiff in error here, stated the deceased had said to him shortly after the accident as to the cause of the fire, "I went into the washroom and bumped into the locker and had matches in my pocket." A rule was in force in plaintiff in error's plant prohibiting smoking. There is no testimony that deceased was smoking or had been smoking immediately before the accident. The proof shows that he did carry matches in his pocket, but there appears to have been no rule as to this last point.

[1, 2] The principal question raised here is whether the injury arose out of and in the course of the employment. The applicant has the burden of proof as to whether the injury was accidental and as to its cause, but it is not necessary, in order to make this proof, that such testimony be given by an eyewitness. The proof may be made by direct or circumstantial evidence. Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Mechanics' Furniture Co. v. Industrial Board, 281 Ill. 530, 117 N. E. 986; Northern Illinois Traction Co. v. Industrial Board, 279 Ill. 565, 117 N. E. 95. An employee while at work for his employer may do those things which are necessary to his own health and comfort, even though they are personal to himself, and such acts will be considered incidental to his employment. Rainford v. Chicago City Railway Co., 289 Ill. 427, 124 N. E. 643; Nelson Construction Co. v. Industrial Com., 286 Ill. 632, 122 N. E. 113; 1 Honnold on Workmen's Comp. § 111; Papinaw v. Grand Trunk Railway Co., 189 Mich. 441, 155 N. W. 545, 12 Neg. & Comp. Cas. Ann. (Ill. Ed.) 243, and cases cited in note. Harper on Workmen's Comp. § 39; Corpus Juris, treatise on Workmen's Comp. Acts, § 69. There can be no question, under the authorities, that the deceased had a right to be where he was at the time of the accident. Somewhat analogous as to facts, though with perhaps not the same reason for the application of compensation acts, are those cases where an accident arises from something incidental to smoking, where smoking has not been prohibited by the employer. Such accidents have frequently been held to be covered by compensation acts as arising out of the employment. Bradbury on Workmen's Comp. (3d Ed.) § 88, p. 660; Boyd on Workmen's Comp. Act (1913) § 482.

In McLaughlan v. Anderson, 4 B. W. C. C. 376, a workman was injured in attempting to regain his pipe which he had dropped. In that case the opinion states (p. 378):

"I think an accident befalls a man 'in the course of' his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing. Now, this man's operation in getting down from the wagon to recover his pipe seems to me to satisfy all these conditions. Taking them in their inverse order, he had a right to be at the place, riding or walking beside the wagons; he was within the time during which he was employed, because the accident happened during the actual period of transit; and he was doing a thing which a man, while working, may reasonably do. A workman of his sort may reasonably smoke, and he may reasonably drop his pipe, and he may reasonably pick it up again."

A workman during a lull in his work struck a match to light a

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cigarette, which ignited an apron which he had on and which his work required him to wear and which had naturally become oil-soaked. The employer was held to be liable under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i). Dzikowska v. Superior Steel Co., 259 Pa. 578, 103 Atl. 351, L. R. A. 1918F, 888.

In another case, where the accident was somewhat similar to the one here under consideration, the cause of the fire was not directly shown. The employee had on his working clothes and the flannel shirt he wore had become somewhat saturated with oil from his work. There was no rule against smoking in the factory. His shirt became ignited and he was injured and was permitted to recover. Chuldzinski v. Standard Oil Co., 176 App. Div. 87, 162 N. Y. Supp. 225.

In a number of cases shown in a note to Standard Oil Co. v. Reagan, 8 Neg. & Comp. Cas. 209, employers have been held liable for injuries arising from employees or others causing explosions, striking matches, and the like. In the Chludzinski Case, supra, although smoking was prohibited and matches were not required in the performance of the duties of the deceased, yet so far as shown there was no rule against carrying matches or any further prohibition against the risk of igniting materials.

[3, 4] Counsel for plaintiff in error argue that the brother's testimony that deceased told him the matches were ignited by striking against the locker was hearsay testimony and therefore improperly admitted. We do not see how counsel for plaintiff in error are entitled to raise this question. That evidence was brought out on cross-examination by counsel for plaintiff in error, and we can find no objection made to it or motion to strike it from the record. The word "accident," as used in the Workmen's Compensation act, should not be construed technically. It was meant to include:

Every injury suffered in the course of employment "for which there was an existing right of action at the time the act was passed; also to extend the liability of the employer to make compensation for injuries for which he was not previously liable and to limit such compensation. If an injury can be traceable to a definite time, place and cause and the injury occurs in the course of the employment, the injury is accidental within the meaning of the act." Baggot Co. v. Industrial Com., 290 Ill. 530, 125 N. E. 254.

The injury, to be accidental, "must be traceable to a definite time, place and cause, but if there is such a definite time, place and cause and the injury occurs in the course of the employment the injury is accidental within the meaning of the act. * * * While it is not intended, and perhaps not possible, to give a definition of the words used in the act as applied to all possible circumstances, it may safely be said that an injury is accidental, within the meaning of the act, which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee." City of Joliet v. Industrial Com., 291 Ill. 555, 126 N. E. 618.

[5, 6] Carrying matches is a very common practice among men, especially those who smoke, in all employments, and unless expressly prohibited, where the surroundings are not apparently dangerous for employees to carry matches, it could hardly be held unreasonable, as a matter of law, for an employee, under the circumstances here shown, to have matches in his possession. Under the evidence in this record we think the Industrial Commission was justified in finding that it was a reasonable inference that the accident arose out of and in the course of the employment, and, there being such evidence in the record, it cannot be held as a matter of law by the court that such accident did not arise out of or in the course of the employment.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

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WEIS PAPER MILL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 13263.)

(Supreme Court of Illinois. June 16, 1920.)

127 Northeastern Reporter, 732.

1. MASTER AND SERVANT—INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT DEFINED; "RISK INCIDENTAL TO EMPLOYMENT."

To recover for an accident under the Workmen's Compensation Act, it must have arisen out of and in the course of the employment, that is, have resulted from a risk reasonably incidental to the employment; and a risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his contract of service.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment; Risk.)

2. MASTER AND SERVANT—COMPENSATION ACT DOES NOT MAKE EMPLOYER INSURER.

An employer within the Workmen's Compensation Act is not an insurer of the safety of his employees, and is liable for compensation only for an injury which occurs to the employee while performing some act in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

3. MASTER AND SERVANT—INJURIES TO EMPLOYEE SLEEPING ON SWITCH TRACK DURING LEISURE PERIOD HELD NOT WITHIN COMPENSATION ACT; "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where an employee loading wagons of straw at a stack sought rest in the shade of a box car during his leisure period and fell asleep and was fatally injured by the moving of the car, the injury did not arise out of or in the course of the employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Error to Circuit Court, Adams County. Albert Akers, Judge.

Claim by Pearl Klosing, under the Workmen's Compensation Act, for compensation for the death of Charles P. Klosing, against the Weis Paper Mill Company. Compensation was awarded by the arbitrator and the Industrial Commission, and the circuit court confirmed the decision of the Commission in proceedings by the employer against the Industrial Commission and others, and the employer brings error. Reversed.

Fyffe, Ryner & Dale, of Chicago, for plaintiff in error.
John E. Wall, of Quincy, for defendant in error.

CARTER, J. Charles P. Klosing at the time of his injury, in June, 1918, was employed by plaintiff in error in loading wagons of straw near its mill. During a rest period, while lying in the shade of a box car on a switch track on plaintiff in error's premises, the car was backed up and ran over his legs, crushing them, and he died the next day in the

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hospital. Compensation was awarded by the arbitrator and the Industrial commission. The cause has been brought to this court on writ of error.

The record shows no controversy as to the facts. The plaintiff in error operated a paper mill in Quincy, Adams county. A large strawstack was situated about half a block south of the mill. There was also a shed 300 or 400 feet from the stack, and there were switch tracks on the mill premises between the shed and the stack. The employees were accustomed to go to the shed for drinking water and kept some of their clothes there. Two wagons were employed in taking the straw to the mill from the stack. While one was going to the mill and being unloaded the other would be in process of loading at the stack. Klosing's work was to assist in loading wagons at the stack and other employees had charge of taking the wagons to the mill and unloading them. The evidence shows that the men loading at the stack, would frequently have to wait until a space was cleared upstairs in the mill for the unloading of the straw hauled there. The deceased and two other persons who were engaged in loading the wagon at the strawstack were resting during such an interval while a wagon was being unloaded at the mill at the time this accident occurred. It seems to have been a very warm day, and no point is made that it was the duty of the deceased to be working at the time of his injury, but it is argued, rather, that the spot he chose for his rest was improper and dangerous; that it could not reasonably have been contemplated in the contract of employment that the deceased, while he had no duties to perform at the strawstack, would lie down on the switch track in the shade of a freight car, which might be moved at any time. It appears from the record that a switch engine came upon that track twice a day. It is also shown that there was shade at the stack where the deceased had been working, and he could have gone to the shed to rest if he had desired.

[1-3] In order for an employee to recover for an injury, such injury must have arisen out of and in the course of the employment. This court has said that to recover for an accident under the Workmen's Compensation Act (Laws 1913, p. 335 it must result from a risk reasonably incidental to the employment; that an accident arises in the course of the employment if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing; that an accident arises out of the employment when it is something the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it. A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. It may be incidental to the employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected therewith. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764. This court has said that it was not intended by this act that the employer who comes within its provisions shall be the insurer of the safety of the employee.

"The employer is liable for compensation only for an injury which occurs to the employee while performing some act for the employer in the course of his employment or incidental to it." Fairbank v. Industrial Com., 285 Ill. 11, 120 N. E. 457.

"An accident, to be within the Workmen's Compensation Act, must have had its origin in some risk of the employment." Edelweiss Gardens v. Industrial Com., 290 Ill. 459, 125 N. E. 260.

Conceding that it may be fairly inferred from the facts in this record that this accident arose in the course of the employment, it may well be questioned whether it arose out of the employment. It is not the rule that all accidents which happen during the leisure periods of the

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employee in attendance on personal comforts or necessities are held not to arise out of the employment; for, if an accident happens at such a time, there would be no break in the employment, even though the employee is paid for the time he is actually at work, especially when the accident occurs on the employer's premises or about his property, unless the workman is doing something wholly foreign to his employment. Acts of ministration to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, the performance of which while at work are reasonably necessary to his health and comfort, are incidental to the employment. 1 Honnold on Workmen's Comp. § 111, and cases cited; Whiting-Mead Commercial Co. v. Industrial Accident Com., 178 Cal. 505, 173 Pac. 1105. See, also, Papinaw v. Grand Trunk Railway Co., 12 Neg. & Comp. Cas. Ann. (Ill. Ed.) 243, and cases cited in note.

Where a ship's engineer in an intensely cold place rigged up a temporary stove to warm his cabin, though he was told during the daytime by his superior officer that it was dangerous and warned not to use it at night, it was held that it was reasonably necessary to have his cabin heated at night, and, the engineer having been asphyxiated at night, it was held the accident arose out of the employment. Edmunds v. Owners Steamship Peterson, 5 B. W. C. C. 157.

Where an employee, after having worked outside in wintry weather for several hours, came into a building, and while awaiting an opportunity to use a freight elevator to carry up beef for his employer sat down in front of the fire box of the boiler and fell asleep, and a few minutes after was awakened by finding his greasy clothing on fire, it was held that upon these facts the arbitrator or commissioner properly found that the injury arose out of the employment. Richards v. Indianapolis Abattoir Co., 92 Conn. 274, 102 Atl. 604.

In a plant manufacturing iron briquettes the injured employee was engaged in dumping cars loaded with briquettes as they came out of the plant—one car about every 15 minutes—and had intervals of rest between unloading them. A car loaded with warm briquettes came out of the plant, and he blocked it and sat or lay down on the track to get warm from the heat of the briquettes, the night being very cold and while lying there or while picking up the briquettes in a recumbent position after getting warm he was caught and injured by the next loaded car. It was held that he was entitled to recover. Northwestern Iron Co. v. Industrial Com., 160 Wis. 633, 152 N. W. 416.

An employee working during the night shift ate his supper, for the sake of warmth, while seated on a tank in the pump room. His employers had provided a dining room for the workmen, but they were not bound to take their meals there. In getting off the tank this employee fell through an aperture in the tank and was scalded, receiving injuries from which he died. It was held that the accident did not arise out of the employment. Brice v. Lloyd, 2 B. W. C. C. 26.

Where a sailor went on deck from his cabin in the course of his employment on a hot night for the purpose of getting fresh air and disappeared, his body being found the next day in the water close to the ship, it was held the accident was not shown to have arisen out of the employment. Marshall v. Owners of Ship Wild Rose, 2 B. W. C. C. 76.

A workman ordered by his foreman to proceed from one part of the work to another stopped, saying that he was going to ease himself. He was later found dead in a hoist where it was held it was unreasonable for him to go and where he could not have gone by mistake. It was held that the accident did not arise out of the employment. Rose v. Morrison & Mason, 4 B. W. C. C. 277.

A city employee doing teaming for the city with his own horses and cart, during the noon hour of the day on which he had been hauling coal

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from a pile near a railroad, sat down to eat his lunch on the railroad track, when another car struck the car against which he was leaning, causing it to "kick." It was held he was not injured in the course of his employment and could not recover from the city under the Compensation Act; that he incurred "a danger of his own choosing and one altogether outside of any reasonable exercise of his employment." Haggard's Case (Mass.) 125 N. E. 565.

To recover on the ground that an accident arose out of the employment, under the authorities it must be held that what the employee was doing was reasonably incident to the employment. He must not unnecessarily increase the risk of injury to himself, and so the risk of liability of his master, beyond that contemplated in his contract of employment. He may not choose an unnecessarily dangerous place for the doing of such things, nor may he do them in an unnecessarily dangerous way. 25 Harvard Law Review, 411, and cases cited. It would hardly be considered as a reasonable incident of the employment that an employee, in the interval of rest between the loading of two wagons, would lie down on the switch track, in the shade of a box car, and run the risk of going to sleep, when the track was known to be used by switch engines during the day; and it does not materially affect this conclusion that at the time Klosing lay down on the tracks, and before he went to sleep, two of his fellow employees were near him, though we conclude from the record that they had left before the car was backed. This case differs in its facts materially from that of Northwestern Iron Co. v. Industrial Com., supra, where the duties of the injured employee required him to be working continuously in and around the tracks and the cars by which he was injured. Here the employee's duties did not so require. He could have rested, if he desired, during the interval between the loading of the wagons, in the shade of the strawstack or in the shed where some of his clothes were, but he chose, for his own convenience, an unreasonably dangerous place, thus exposing himself to a wholly unnecessary risk. We cannot hold that there would be a resonable implication in the contract of employment that this employee might rest in such a dangerous place during the interval between his periods of actual work in loading wagons.

The judgment of the circuit court will therefore be reversed.

Judgment reversed.

BOARD OF COM'RS OF GREENE COUNTY v. SHERTZER ET AL. (No. 10790.)

(Appellate Court of Indiana. Division No. 1. June 25, 1920.)

127 Northeastern Reporter, 843.

1. MASTER AND SERVANT — PAINTER HELD A "SERVANT" WITHIN COMPENSATION ACT, AND NOT AN INDEPENDENT CONTRACTOR.

One hired to do painting and paper hanging, at 50 cents per hour for painting and 30 cents a roll for paper hanging, who was his own boss as to how the paint and paper was to be put on, with appliances and materials furnished by the owner of the building, *held* a "servant," within the Workmen's Compensation Act, and not an independent contractor.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Servant.)

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2. MASTER AND SERVANT — DEATH BY FALL DURING ATTACK OF VERTIGO HELD ACCIDENT, WITHIN COMPENSATION ACT; "ARISING OUT OF EMPLOYMENT."

Where a painter standing on a ladder by reason of his employment fell as the result of sudden attack of vertigo, the injuries causing his death resulted from an accident "arising out of his employment" and not from disease, and compensation under the Workmen's Compensation Act was allowable.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

3. MASTER AND SERVANT—INDUSTRIAL BOARD'S FINDING ON EVIDENCE FINAL.

A finding by the Industrial Board that the death of an employee was the result of an accident arising out of the employment, within the Workmen's Compensation Act, will not be disturbed, where there is evidence to support it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Claim under the Workmen's Compensation Act (Laws 1915, c. 106) by Jennie M. Shertzer and another for the death of John H. Shertzer, an employee, against the Board of Commissioners of Greene County, employer. From an award of the Industrial Board in favor of claimants, the employer appeals. Affirmed.

William L. Cavins, of Bloomfield, D. W. McIntosh, of Linton, and Guy H. Humphreys, of Bloomfield, for appellant.

William L. Slinkard, of Bloomfield, for appellees.

REMY, J. The superintendent of the county poor asylum of Greene county, by oral direction of the board of commissioners of said county, the appellant herein, employed one John H. Shertzer, a painter and paperhanger, to do certain painting and paper hanging, for which work said Shertzer was to receive 50 cents an hour for painting and 30 cents a roll for hanging the paper. Appellant was to, and did, furnish the necessary ladders and scaffolding, and was also to select and furnish the paints, paper, and other materials to be used in the work. Shertzer was to be "his own boss" as to how the paint and paper was to be put on. A few minutes after he had eaten a heavy dinner, and while doing the work, Shertzer fell from a ladder on which he was standing and upon the floor of the room where the work was being done. When asked how he came to fall, he replied that he "became dizzy, and seemed to be going round and round." As a result of the injuries thus received, Shertzer died ten days later. The physician who attended him stated that dizziness such as was complained of by Shertzer might have been the result of eating an excessive meal.

Appellees, who were the dependents of Shertzer, made application to the Industrial Board for compensation, and, upon hearing evidence showing the above facts, the board found that Shertzer at the time of his injury was in the employment of appellant, and that his death was the result of an accident arising out of and in the course of such employment, and made an award in favor of appellee Jennie M. Schertzer. Appellant has assigned as error that the award is not sustained by sufficient evidence, and is contrary to law.

It is first urged by appellant that Schertzer at the time of the accident which resulted in his death was an independent contractor, and that there

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is no evidence to sustain the finding of the Industrial Board that he was at that time in the employment of appellant.

[1] It appears from the evidence, as above stated, that Shertzer was hired to do the painting and paper hanging, the materials to be selected and furnished by appellant; that appellant was to supply the ladders and scaffolding required in the conduct of the work and that his compensation was to be 50 cents an hour for the painting and 30 cents a roll for the papering. Under such contract Shertzer could have ceased work at any time he chose, and appellant could have discharged him at any time. The evidence that in the work of putting on the paint and paper Shertzer "was his own boss" must be considered in conection with the other evidence as to the relationship of the parties to the contract, and when so considered it cannot be said that Shertzer must be held to have been an independent contractor. We hold that there is evidence to support the finding of the Industrial Board that Shertzer was at the time in the employment of appellant. See Muncie Foundry, etc., Co. v. Thompson, 123 N. E. 196. Caca v. Woodruff, 123 N. E. 120; Zeitlow v. Smock, 117 N. E. 665.

It is asserted by appellant that it conclusively appears from the evidence that Shertzer fell to his death as a result of an attack of vertigo, and that therefore there can be no recovery of compensation, even though it should be found that at the time of the accident he was in the employ of appellant.

[2] If it be conceded that Shertzer's fall was the result of vertigo, it does not follow that the cause of his death was the disease. A fall as a result of vertigo would not, in all probability, have caused death or serious injury, had it not been for the fact that Shertzer was at the time, and by reason of his employment, standing upon the ladder. The exact question here presented was recently decided by this court adversely to appellant's contention. Miller v. Beil, 127 N. E. 567. See, also, Carroll v. What Cheer Stables Co., 38 R. I. 421, 96 Atl. 208, L. R. A. 1916D, 154, Ann. Cas. 1918B, 346; Wicks v. Dowell & Co., 2 K. B. 225, 2 Ann. Cas. 732.

[3] The question as to whether or not the death of the employee was the result of an accident arising out of his employment was a question for the Industrial Board. American Hominy Co. v. Davis, 126 N. E. 703. There is evidence to support the finding and award.

The award is affirmed, and by virtue of the statute the amount is increased 5 per cent.

INDIAN CREEK COAL & MINING CO. v. BEACH. (No. 10734.)

(Appellate Court of Indiana, Division No. 1. June 22, 1920.)

127 Northeastern Reporter 850.

MASTER AND SERVANT—BOOKKEEPER'S KNOWLEDGE OF EMPLOYEE'S INJURY HELD NOT NOTICE TO EMPLOYER REQUIRED BY COMPENSATION ACT.

That employer's bookkeeper had actual knowledge of employee's injury did not dispense with necessity of giving employer, a corporation, the written notice required by Workmen's Compensation Act, § 22, which notice required to be served on employer or agent on whom a summons in a civil action could be served.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

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Appeal from Industrial Board.

Proceeding under Workmen's Compensatoin Act by Cora Beach for compensation for death of her husband, Paris H. Beach, opposed by the Indian Creek Coal & Mining Company, employer. Award for claimant by the Industrial Board, and the employer appeals. Reversed and remanded.

Chas. E. Henderson and James L. Murray, both of Indinapolis, for appellant.

John A. Riddle, of Vincennes, for appellee.

ENLOPE, P. J. One Paris H. Beach was, on the 29th day of November, 1917, an employee of the appellant company, and it is claimed that on said date he received an injury by being struck in the pit of the stomach, while engaged at his work, by a "jack pipe," which then and there fell. On the 5th day of July, 1919, the said Paris H. Beach filed an application before the Industrial Board, for the adjustment of his claim for compensation for said alleged injury. The case was first heard by one member of the board, but before an award was made the said Paris H. Beach died of cancer of the stomach. Thereafter by agreement of the parties, his widow, Cora Beach, was substituted as a party to the action. The one member of the board who heard said cause made an award, allowing the appellee compensation at $13.20 per week for 300 weeks and burial expenses not exceeding $100. Application was duly made for the review of such award by the full Industrial Board, which application was granted and such review had.

Upon review by the full board said board by a majority of its members made the following finding:

"* * * And the full board having heard the argument of counsel, having reviewed the original evidence, and being fully advised in the premises finds by a majority of its members that on the 29th day of November, 1917, one Paris H. Beach was in the employment of the defendant at an average weekly wage in excess of $24; that on said date he received a personal injury by an accident, arising out an in the course of said employment, which resulted in his death on the 24th day of July, 1919. That the defendant had actual knowledge of the injury to the said Paris H. Beach on the first or second day after it occurred, and had actual knowledge of his death immediately after it occurred. That the said Paris H. Beach left as his sole and only dependent the plaintiff, Cora Beach, his wife, with whom he was living at the time of his injury and death."

Upon which finding by a majority of its members, it, by a majority of its members, made the same award heretofore stated. From this award this apeal is prosecuted, and the appellant alleges that "the award of the full Industrial Board of Indiana is contrary to law."

The appellant contends that the said award is contrary to law for the reason "that the uncontradicted evidence shows that no notice of any accident or injury to the deceased was given to his employer, and that his employer had no knowledge of the same within the time required by the statute."

Section 22 of the Compensation Act (Acts of 1915, p. 392) provides:

"Every injured employee or his representative shall immediately upon the occurence of an injury or as soon thereafter as practicable give or cause to be given to the employer written notice of the injury and the employee shall not be entitled to pyhsician's fees nor to any compensation which may have accrued, under the terms of this act, prior to the giving of such notice; unless it can be shown that the employer, his agent or

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representative had knowledge of the injury or death, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person, or for equally good reason; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the injury or death, unless reasonable excuse is made to the satisfaction of the Industrial Board for not giving such notice."

In this case there is no claim that any written notice was given, nor are any of the reasons mentioned in said section for not giving such written notice offered in this case save and except the first only, to wit, "that the appellant had actual knowledge of the said alleged injury on the first or second day after the same occurred," and that therefore, under said section of the statute, no notice was required.

The Industrial Board found in accordance with the claim of the appellee that the appellant had such actual knowledge, and the question which we have to consider is . Is there any evidence in the record to support said finding? If there is, this award must be affirmed, otherwise reversed. The deceased in his said application for compensation had alleged that the appellant had actual knowledge of said injury, and at the hearing there was an attempt to establish this fact. The deceased in his testimony given before the one member of the Industrial Board had testified, so far as material to the point now under consideration:

"Mr. Blakely was with me. * * * It knocked the breath out of me and Mr. Blakely carried me back, but I went back to work in a couple or three hours. * * * After my injury and at the time no representative of the mine or any of the bosses knew anything of it unless some one told them. I did not tell them. * * * William McQuade was the superintendent at the time. I did not talk to him about it. * * * I did not talk to any one, except some of the men. I do not know which ones. * * * I think Mr. Gray is the only one I told about getting hit. I never gave the mine any other kind of notice, or take any thought about it. * * * I never sent regular word to my boss. * * * I told Mr. Gray about getting hit in the stomach the night following. * * * I think he asked me why I was not at work. * * * I do not remember that I told Mr. Gray to tell them I was sick. * * * At the time the jack pipe blew off I told Ed Gray, the bookkeeper, about it when I came home. He lived right here. * * * I talked to Jack or Pat or Bill [McQuade]—I don't know which one."

From the foregoing it conclusively appears that the knowledge, which it was necessary for appellant to have, which would excuse the giving of the notice required by the statute, must rest, if at all, upon the conversation had, as testified to between the deceased, Paris H. Beach, and Ed Gray, one of the bookkeepers at appellant's mine. Was notice to Ed. Gray a sufficient notice to bind appellant in the matter of its having knowledge?

The statute then in force concerning the giving of notice (section 23 of said act) provided:

"Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of this state. * * * "

It will not be contended that a summons served on Ed Gray, as one of the bookkeepers, at his home at the time and under the circumstances disclosed by the testimony of the deceased, without a further showing that there was no superior officer of appellant company in said county upon whom service of process could be had, would be a valid service; and it has been expressly held that a conversation between the wife of an injured employee and the bookkeeper, at the employer's factory, was not a verbal notice to the employer of the accident, nor can it be inferred

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that the bookkeeper was under any duty to communicate what the wife told him to the employer, or that he actually did so. Eydman v. Premier, etc., Co., Ltd. (1915) W. C. & Ins. Rep. 82.

The finding of the Industrial Board as to the appellant's knowledge of said accident, not being sustained by any evidence, the said award is therefore contrary to law. The award of the Industrial Board is therefore reversed, and this cause remanded to the Industrial Board for further proceedings.

MILLER ET AL. v. BEIL ET AL. (No. 10759.)

(Appellate Court of Indiana, Division No. 1. June 2, 1920.)

127 Northeastern Reporter, 567.

1. MASTER AND SERVANT — DEATH OF EPILEPTIC FROM DROWNING IN TANK AN ACCIDENT "ARISING OUT OF EMPLOYMENT."

Where an epileptic employee during a seizure fell into a tank of water because in a position where his employment required him to be, and was drowned, the accident "arose out of his employment," though its remote cause was to be found in his own physical condition, and his dependents were entitled to compensation under Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.

2. MASTER AND SERVANT—ACCIDENT ARISING OF EMPLOYMENT QUESTION OF FACT FOR INDUSTRIAL BOARD.

Whether or not the death of an employee was the result of an accident arising out of his employment was a question of fact for the Industrial Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act for the death of Carl Beil, the employee, by Frank J. Beil and Charlotte E. Beil, against Jacob Miller and John Young, the employers. Compensation was awarded by the Industrial Board, and the employers appeal. Judgment affirmed.

Turner, Merrell & Locke, of Indianapolis, for appellants.
O. E. Brumbaugh, of Frankfort, for appellees.

REMY, J. Appellants were in the business of threshing wheat and other grain. Steam power was used, and appellants had in their employ at the time one Carl Beil whose duty it was to haul water from a nearby reservoir, in a water tank drawn by horses. The water tank was made of wood, and was 7½ feet long, 3 feet wide, and 28 inches deep, with an opening in the top 23 inches square. By the side of the opening, and fastened to the top of the tank, was a pump. When the tank was being filled, the water was pumped through a hose which connected the pump with the reservoir. In operating the pump it was necessary for Beil to

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stand on the top of the tank near the opening. On the morning of July 12, 1919, and a short time after Beil in the course of his employment had gone to get water, the tank, partially filled with water, was found at the reservoir, and in the tank was the lifeless body of Beil. The employee who thus lost his life was subject to epilepsy.

Appellees, who were the dependents of Beil, made application to the Industrial Board for compensation, and, upon hearing the evidence showing the above facts, the board found that said employee died as the result of an injury received by him by reason of an accident arising out of and in the course of his employment, and made an award.

Appellants have assigned as error that the findings and award are not sustained by sufficient evidence, and are contrary to law. It is urged by appellants that there is no evidence to show that the death of the employee was the result of an injury arising out of his employment, but that "from all the evidence in the case it appears conclusively that the death was the result of a disease to which deceased was subject," and that, under clause (d) of section 76 of the Workmen's Compensation Act (Acts 1915, p. 416), the dependents are not entitled to compensation.

[1] Conceding that the evidence does conclusively show that decedent fell in the tank as a result of an epileptic fit, it does not follow that the cause of his death was the disease. Had it not been that his employment required him to work at or near the opening in the tank, the epileptic fit may not have caused death. Beil's death, which was by drowning, came about because he fell into the tank, and from a position in which his employment required him to be. The accident none the less arose out of his employment because its remote cause is to be found in his own physical condition. Carroll v. What Cheer Stables Co., 38 R. I. 421, 96 Atl. 208, L. R. A. 1916D, 154, Ann. Cas. 1918B, 346; Wicks v. Dowell & Co., 2 K. B. 225, 2 Ann. Cas. 732.

[2] The question as to whether or not the death of the employee was the result of an accident arising out of his employment was a question of fact for the Industrial Board. American Hominy Co. v. Davis, 126 N. E. 703. There was some evidence to support the finding.

Judgment affirmed.

INDIANA POWER & WATER CO. v. MILLER. (No. 10760.)

(Appellate Court of Indiana, Division No. 2. June 24, 1920.)

127 Northeastern Reporter, 837.

MASTER AND SERVANT — EVIDENCE HELD TO SHOW BLINDNESS RESULTED FROM INJURY AND NOT FROM DISEASE.

Evidence that an employee's sight began to fail shortly after an injury to one eye, and that in seven months he lost the sight of both eyes, with expert testimony that the condition might have resulted from the injury, *held* sufficient to support a finding that blindness was due to the injury; claimant not being required to present proof which entirely excluded the possibility that his blindness was due to constitutional disease.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act (Laws 1915, c. 106) by John E. Miller against the Indiana Power & Water Company

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to recover compensation for loss of sight. From an award of compensation by the Industrial Board, the employer appeals. Award affirmed, and increased 5 per cent.

J. W. Fesler, Harvey J. Elam, and Howard S. Young, all of Indianapolis, and Emison, Hoover & Gregg, of Vincennes, for appellant.
John Riddle, of Vincennes, for appellee.

McMahon, C. J. Appellee, while working in appellant's coal mine, received an injury in his left eye; following this injury he was not able to work for two or three weeks; he had the eye treated by eye specialists; his sight began to fail shortly after the injury, and in six or seven months thereafter he had completely lost the sight of both eyes.

The Industrial Board found that the injury complained of arose out of and in the course of appellee's employment while working for appellant, and awarded 500 weeks' compensation at the rate of $13.20 per week, with the provision that the total compensation should not exceed $5,000. Appellant appeals from this award, and contends that the award is not supported by the evidence and is contrary to law. There is no contention over the finding that appellee was injured in the course of his employment by being struck in the eye with a piece of coal or something. Appellant contends that there is no evidence that this injury caused appellee to lose his eyesight, but that the undisputed evidence shows that the blindnes was caused by a constitutional disease. In support of this contention appellant insists that, in a case of this kind, the fact that the blindness was the result of the injury must be proven by the testimony of physicians, and that such fact cannot be proven by nonexpert witnesses.

It is not necessary for us to pass upon this contention, as Dr. Knapp, in answering the first question asked by appellant on cross-examination, testified that the condition of appellee's eyes, the atrophy of the optic nerves in both eyes, might have resulted from the injury suffered by appellee in February, 1917. This statement, when taken with the other evidence, is sufficient to support the award. We have carefully examined the evidence as set out in the briefs and as shown by the record, and find that there is ample evidence to support the award.

Appellee was not required to present such proof as would entirely exclude the possibility that his blindness was due to a constitutional disease. Bucyrus Co. v. Townsend, 117 N. E. 656.

Award affirmed, and increased 5 per cent.

BIANCHI v. BOARD OF COM'RS OF PORT OF NEW ORLEANS.
(No. 23538.)

(Supreme Court of Louisiana. May 3, 1920.)

84 Southern Reporter, 657.

(Syllabus by Editorial Staff.)

MASTER AND SERVANT—EVIDENCE HELD TO SHOW THAT EMPLOYEE, SUING FOR COMPENSATION, HAD RECOVERED.

In action under Employers' Liability Act by employee, who had received compensation while he was out of work because of injury, and who had returned to work and had been thereafter discharged, evidence

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held to sustain finding that employee had regained his capacity for work before being discharged.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Appeal from Civil District Court, Parish of Orleans; Hugh C. Cage, Judge.

Action by Charles Bianchi against the Board of Commissioners of the Port of New Orleans. Judgment for defendant, and plaintiff appeals. Affirmed.

James J. McLoughlin, of New Orleans, for appellant.
James Wilkinson, of New Orleans, for appellee.

O'NIELL, J. Plaintiff appeals from a judgment rejecting his demand for compensation under the Employers' Liability Act (Laws 1914, p. 44). He sprained his back, or suffered what the doctors call a subluxation of the spine, while working as a carpenter for the defendant board. The injury did not compel him to quit work until four days after the occurrence. He was then attended by defendant's physician, and later by his own physician, and, on the advice of defendant's physician, was put on the compensation roll. He received compensation for five weeks, $15 for the first week and $10 a week for four weeks. At the end of the five weeks he applied to defendant's physician for a certificate with which he might return to work. When he applied for re-employment, he stated that he was not yet able to do hard work, and was therefore given a position as watchman. At the end of three weeks he was discharged. It appears that there was cause for his discharge, and that it had no relation his physical condition. He applied, then, to be re-employed as a carpenter, and was tendered employment; but, because of a disagreement as to the wages he demanded, he declined to return to work. Thereafter, he made application to defendant's physician to be reinstated on the compensation roll, and, on the doctor's refusal to issue the certificate, he brought this suit.

The district judge, in his reasons for judgment, states that he was convinced by the testimony that plaintiff had regained his capacity for work before he was discharged from the position of watchman. Having carefully read the testimony, we concur in the judge's conclusion of fact. It would serve no good purpose to print a review of the evidence, consisting of the testimony of X-ray experts, as well as of a layman who testified that he saw the man do hard work after he was discharged from the position of watchman.

The judgment appealed from is affirmed.

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GRITTA'S CASE.

IN RE J. M. HARTWELL & D. KNOWLTON.

IN RE FEDERAL MUT. LIABILITY INS. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. June 23, 1920.)
127 Northeastern Reporter, 889.

1. MASTER AND SERVANT—"CHILD OR CHILDREN" IN COMPENSATION ACT, MEANS LEGITIMATES.

The expression "child or children," used in Workmen's Compensation Act, part 2, § 7, cl. (c), as amended by St. 1914, c. 708, § 3, cl. (c), and St. 1919, c. 204, refers only to a legitimate child or children, in view of Rev. Laws, c. 133, § 3.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Child.)

2. MASTER AND SERVANT—ILLEGITIMATE CHILDREN, MEMBERS OF EMPLOYEE'S FAMILY, HELD DEPENDENTS ENTITLED TO COMPENSATION.

Illegitimate children of deceased employee, living with him and his mistress, who had a living husband undivorced, in one family, and in fact dependent on the employee, *held* entitled to compensation under Workmen's Compensation Act, as amended, though their mother was not.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act by Maria S. Gritta, alleged widow, for compensation for the death of Andrea Gritta, the employee, opposed by J. M. Hartwell & D. Knowlton, the employer, and the Federal Mutual Liability Insurance Company, the insurer. Compensation was denied the widow but awarded her children, the award affirmed by the superior court, and the insurer appeals. Decree of the superior court confirming award affirmed.

The second and third rulings requested by the insurer, referred to in the opinion, follow:

(2) On all the evidence, Frances and Andrea Pappalardo [decedent's children], otherwise known as Frances and Andrea Gritta, are not entitled to compensation.

(3) On all the evidence, Frances and Andrea Pappalardo, otherwise known as Frances and Andrea Gritta, were not members of the deceased employee's family.

J. Frank Scannell, of Boston, for appellant.
A. David Epstein, of Boston, for appellees.

CROSBY, J. The record shows that Mary Pappalardo was married in Italy and lived there with her husband; that before she left that country, in 1911, her husband had been convicted of serious offenses and committed to prison for life; that his wife then came to America, met the deceased employee, and later, about September 26, 1913, "went through

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a marriage ceremony, legal in form," with him; and that thereafter the parties lived together as husband and wife.

The single member of the Industrial Accident Board found that in entering into the alleged marriage contract she did so with the belief there was no legal obstacle to it, and that "at no time was any question raised in her mind as to the legality of her marriage, until the present proceedings were begun"; that two children were born, and the parents and children lived together until the employee received an injury which resulted in his death; and, further, that the children were totally dependent upon the deceased.

[1] He also found that the mother is not entitled to compensation under the act; that finding, upon review, has been affirmed by the Industrial Accident Board without appeal. The board also affirmed the finding that the children did not come within the definition of "child or children" as those words are used in St. 1911, c. 751, part 2, § 7, cl. (c), as amended by St. 1914, c. 708, § 3, cl. (c), and St. 1919, c. 204. They must be held to refer only to a legitimate child or children. R. L. c. 133, § 3; Baylis v. Baylis, 207 N. Y. 446, 101 N. E. 176.

After defining the persons who are conclusively presumed to be wholly dependent for support upon a deceased employee, in part 2, § 7, it is further provided in the same section that—

"In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury."

Part 5, § 2, defines dependents as follows:

" 'Dependents' shall mean members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury."

In Cowden's' Case, 225 Mass. 66, at page 67, 113 N. E. 1036, 1037, it was said:

" 'Family' in its usual sense means 'the collective body of persons who live in one house and under one head or management.' Dodge v. Boston & Providence R. R., 154 Mass. 299, 301. That is the significance ordinarily attributed to the word under the act. Kelley's Case, 222 Mass. 538. See Newman's Case, 222 Mass. 563, 568."

See cases cited 19 Cyc. 451, 452, 453.

The board has found that the children were members of the employee's family. that finding is amply supported by the evidence. It would seem plain from the facts recited in the record, that these children from the date of their respective births lived with their mother and the employee until his death; that he supported them and they were a part of his family to the same extent as if their parents had been lawfully married. The deceased employee recognized the moral obligation which rested upon him to support the children and cared for them as his own lawful offspring, and manifestly they were in fact members of his family at the time of his death.

[2] The question remains whether the illegitimacy of these children affects their status as members of the employee's family under the act. It is the contention of the insurer that, as the act does not specifically include illegitimate children as entitled to its benefits, they should not be held to take by implication; and that in the interests of marital morality and sound public policy they should not be held to be members of the employee's family. Considerations of public policy which would prevent a wrongdoer from participating in the benefits of the act ought not to apply to innocent children born out of lawful matrimony; they are not responsible for their existence or status, they have committed no wrong, and they must be supported as the death of the employee has taken from

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them the care and maintenance which they had previously received from him as the head of the family. We are of opinion that upon the facts disclosed by the record they are entitled to compensation under the act.

Although the question has not previously been considered by this court, the conclusion reached is in harmony with that of courts in other jurisdictions where it has arisen under workmen's compensation acts containing provisions similar to our own in this respect. Roberts v. Whaley 192 Mich. 133, 158 N. W. 209, L. R. A. 1918A, 189; Scott's Case, 117 Me. 436, 104 Atl. 794; Piccinim v. Connecticut Light & Power Co., 93 Conn. 423, 106 Atl. 330.

The cases of Bell v. Terry & Tench Co., 177 App. Div. 123, 163 N. Y. Supp. 733, and Scott v. Independent Ice Co. (Md.) 109 Atl. 117, are not at variance with the conclusion here reached. The language of the Workmen's Compensation Acts there construed are materially different from ours, and for that reason need not be considered.

It follows that the rulings 2 and 3, requested by the insurer, could not properly have been made.

Decree affirmed.

HOGAN'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. June 26, 1920.)

127 Northeastern Reporter, 892.

1. MASTER AND SERVANT—FINDING BY ACCIDENT BOARD MUST STAND UNLESS UNSUPPORTED.

A finding by the Industrial Accident Board must stand unless wholly unsupported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT—COMPENSATION CLAIMANT, A TEAMSTER LET TO ANOTHER HELD TO REMAIN IN EMPLOY OF GENERAL EMPLOYER.

Teamster let with team, who received order from foreman of hiring company to go to freight house for wool and deliver it, who was injured while delivering a load at a warehouse while using rope and tackle owned by the consignee, *held* to have remained in the employ of his general employer, having been given only general directions by the hiring company, so that compensation was properly awarded against the general employer.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act by John H. Hogan, the employee, opposed by M. J. McCarthy & Company and another the employers, and the London Guarantee & Accident Company and another, the insurers. Compensation was awarded to be paid by the named insurer, the award confirmed by the superior court, and the insurer appeals. Decree affirmed.

H. S. Avery, of Boston, for insurer.

CARROLL, J. John J. Hogan, the employee, at the time he received the injury complained of was a teamster in the general employ of M. J. McCarthy & Company. On the morning of the accident he drove the

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team from the general employer's stable to the Youlden, Smith & Hopkins' "stand" on Atlantic avenue, Boston, and received an order from the foreman of that company to go to the freight house for some wool and deliver it at the storehouse of the owner. Two loads had been disposed of, and as the employee was delivering the third to the firm of Cordingly & Company at its warehouse on Summer street, he was injured. In unloading the wool a rope and tackle owned by Cordingly & Company were used. The rope was lowered from the building to the wagon by an employee of Cordingly & Company, and Hogan fastened the tackle to one of the bags of wool, which in some way broke away from the fastening and fell upon him. Both M. J. McCarthy & Company and Youlden, Smith & Hopkins were insured. The Industrial Accident Board found that Hogan was in the employ of M. J. McCarthy & Company when injured, and awarded compensation. From a decree of the superior court sustaining this finding, the insurer of M. J. McCarthy & Company appealed.

[1, 2] The question we have to decide is whether the finding of the Industrial Accident Board, that Hogan when injured was in the employ of M. J. McCarthy & Company, was wholly unsupported by the agreed facts and the evidence. The employee received his wages from the general employer, and in the management of the team was its servant. He was doing the work of a teamster under the special employment of Youlden, Smith & Hopkins precisely as he would have done it under his general employment if the owner of the wool had hired the general employer to do the teaming. No specific instructions were given to Hogan by Youlden, Smith & Hopkins as to the manner of delivering or unloading the wool, only the most general directions were given him, he was told to go to the freight house, get the wool and deliver it where ordered; in doing the work of loading and unloading, of transporting and delivering it, he was left entirely to himself, and no further directions were given by Youlden, Smith & Hopkins. It is the ordinary work of a truckman to unload that which he has carried, and it could be found to be within the scope of the authority of the general employer to give specific orders to such driver, as was the employee, as to the manner in which he was to unload the wool. At least in the absence of evidence showing such control by Youlden, Smith & Hopkins, it may be presumed that the authority still continued in the general employer. The case at bar is to be distinguished from Scribner's Case, 231 Mass. 132, 120 N. E. 350, 3 A. L. R. 1178, where the right and exercise of specific control as to the work of the employee passed from the general to the special employer. It might have been found (as it was found by the Industrial Accident Board), that the work which Hogan was doing when injured was within the general control of M. J. MrCarthy & Company, and not of Youlden, Smith & Hopkins; and that the act of the employee at the time of the injury was one in which, under the practice of the parties, the employee continued subject to the direction and control of his general employer, and did not become subject to that of the company to whom he was lent or hired. The case comes within the principle and authority of Clancy's Case, 228 Mass. 316, 117 N. E. 347, and Emack's Case, 232 Mass. 596, 123 N. E. 86; Quinby Co. v. Estey, 221 Mass. 56, 108 N. E. 908; Paulson v. Jarvis, 122 L. T. Rep. 471.

Decree affirmed.

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WHITE v. SLATTERY CO.

(Supreme Judicial Court of Massachusetts. Suffolk. May 20, 1920.)

127 Northeastern Reporter, 597.

4. MASTER AND SERVANT — EMPLOYEE'S FAILURE TO RESERVE UNDER COMPENSATION ACT COMMON-LAW RIGHTS HELD A BAR TO ACTION.

The facts that defendant employer was a subscriber under the Workmen's Compensation Act, and that plaintiff, an injured employee, had not reserved her common-law rights as provided in such act (St. 1911, c. 751, pt. 1, § 5), were a complete bar to plaintiff's cause of action for her injuries at common law, if they arose out of and in the course of her employment.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

5. MASTER AND SERVANT — INJURIES WHILE LEAVING WORK DURING LUNCH HOUR HELD TO "ARISE OUT OF AND IN COURSE OF EMPLOYMENT."

Injuries to female buyer of millinery employed by department store when using its elevator to leave store during lunch hours to buy theater tickets for herself and mother *held* to have arisen out of and in the "course of her employment" within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

6. MASTER AND SERVANT—EMPLOYEE OF SUBSCRIBER UNDER COMPENSATION ACT HELD NOT ENTITLED TO SUE AT LAW, NOT HAVING GIVEN NOTICE.

Plaintiff having been employee of defendant, a subscriber under the Workmen's Compensation Act, and not having given notice necessary under St. 1911, c. 751, pt. 1, § 5, to retain her right to action at law for injuries, injuries having been received and having arisen out of and in course of employment, she could not maintain action at law.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Exceptions from Superior Court, Suffolk County. Lloyd E. White, Judge.

Action by Katherine M. White against E. T. Slattery Company, wherein defendant filed a plea in abatement as well as the general issue. There was a finding for plaintiff on the issue of fact involved in the plea in abatement, and directed verdict for defendant on the general issue, and both parties except. Defendant's exceptions to finding on its plea in abatement sustained, and judgment entered for it; plaintiff's exceptions overruled.

John J. O'Hare and John P. Sylvia, Jr., both of Boston, for plaintiff.

Sawyer, Hardy, Stone & Morrison, of Boston (E. C. Stone and Gay Gleason, both of Boston, of counsel), for defendant.

RUGG, C. J. This is an action of tort wherein the plaintiff seeks to recover compensation for injuries sustained by her in 1912. The plaintiff filed a declaration briefly but adequately setting forth her cause of

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action. Thereupon the defendant filed a paper which it entitled, "Defendant's Motion and Plea." The substance of this pleading was that at the time of the injuries alleged in the plaintiff's declaration she was in the employ of the defendant and that the defendant was a subscriber under the Workmen's Compenstion Act, St. 1911, c. 751, and that the plaintiff had at no time given notice in writing to the defendant under part 1, § 5, of the act, that she claimed a right of action at common law to recover damages for personal injuries, and that hence her right of action at common law was waived, "wherefore the defendant prays that the writ in said action may abate."

[1, 2] The substantive facts set forth in this pleading do not constitute matter in abatement, but in bar. A plea in abatement goes to the form of the writ; a plea in bar goes to the cause of action. Whiton v. Balch, 203 Mass. 576, 578, 89 N. E. 1045. Any fact which impeaches the form of the writ, the timeliness of the action, the capacity of the parties, or such like matter not attacking the foundation of the cause of action, properly may be pleaded in abatement. Misnomer or any misdescription of parties. Trull v. Howland. 10 Cush. 109, 112 57 Am. Dec. 82; Day v. Floyd, 130 Mass. 488; Anderson v. Qualey, 216 Mass. 106, 108, 103 N. E. 90; nonjoinder of necessary parties, Feigenspan v. McDonnell, 201 Mass. 341, 345, 87 N. E. 624; Townsend v. Wheatland, 186 Mass. 343, 71 N. E. 782; the bringing of the writ in wrong county, Silver v. Graves, 210 Mass. 23, 32, 95 N. E. 948; pendency of prior suit between the same parties for the same cause, Worcester v. Lakeside Mfg. Co., 174 Mass. 299, 302, 54 N. E. 833; Moore v. Spiegel, 143 Mass. 413, 9 N. E. 827. that the plaintiff is not owner of or for any reason is not entitled to prosecute the cause of action either for his own benefit or that of another, Fay v. Guynon, 131 Mass. 31, 34; temporary inhibition operating on the plaintiff, National Fertilizer Co. v. Fall River Five Cents Saving Bank, 196 Mass. 458, 82 N. E. 671, 14 L. R. A. (N. S.) 561, 13 Ann. Cas. 510; coverture, Hayden v. Attleborough, 7 Gray, 338; the disability of being an Indian, Jaha v. Belleg, 105 Mass. 208; or being an alien enemy, Friedenwald Co. v. Warren, 195 Mass. 432, 434, 81 N. E. 207; infancy, Smith v. Carney, 127 Mass. 179; or other disability of plaintiff, Chamberlayne v. Nazro, 188 Mass. 454, 74 N. E. 674—must be taken advantage of by plea in abatement. Certain matters like nonexistence of corporation made party to the action, Whiton v. Balch, 203 Mass. 576, 89 N. E. 1045, and cases cited; non tenure in real actions, Dewey v. Brown, 5 Pick. 238; that the action is prematurely brought, Franklin Savings Institution v. Reed, 125 Mass. 365. that party is alien enemy in real actions, Hutchinson v. Brock, 11 Mass. 119—may be pleaded either in abatement or in bar.

[3] The question whether a matter is in abatement or in bar is to be decided, not by the form in which it is presented, but by its substance. If it is essentially in bar of the action, it will be so treated and considered even though cast in the form of a plea in abatement. Merriman v. Currier, 191 Mass. 133, 141, 77 N. E. 708; Davis v. Carpenter, 172 Mass. 167, 172, 51 N. E. 530; Allin v. Connecticut River Lumber Co., 150 Mass. 560, 563, 23 N. E. 581, 6 L. R. A. 416.

[4] The facts that the defendant was a subscriber under the Workmen's Compensation Act and that the plaintiff was its employee and had not reserved her common-law rights as provided in part 1, § 5, of that act, if found to be true, were a complete bar to the cause of action set out in the plaintiff's declaration provided the injury of which she complained arose out of and in the course of that employment. Young v. Duncan, 218 Mass. 346, 106 N. E. 1; Gilbert v. Wire Goods Co., 233 Mass. 570, 124 N. E. 479. See Southern Pacific Co. v. Cal., 251 U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. ——. These facts did not constitute any disability attaching to the plaintiff, nor any defect in the writ. In short, they do not relate to any matter of form. These facts would not enable

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the plaintiff to frame a more perfect writ. On the contrary, they went to the very vitals of the plaintiff's action. They showed that she never had, did not have at the date of the writ, and never could have a cause of action at law against the defendant arising out of the incident of which she complained. They demonstrated that her only remedy was under the peculiar procedure afforded by the Workmen's Compensation Act which is not an action at law at all. It properly, therefore, should have been pleaded in bar and must be treated now as a matter in bar.

In Young v. Duncan, 218 Mass. 346, 106 N. E. 1, the question was raised by a paper entitled "Motion and Plea" which both parties "treated * * * as a plea in abatement," and the case was decided on its merits. That case affords no authority for the contention that the facts here or there pleaded constitute anything else than proper ground for a plea in bar.

This case comes before us on two bills of exceptions.

The first one is entitled "Defendant's Bill of Exceptions with Reference to Trial on the Plea in Abatement." It relates to the trial to a jury upon the plea in abatement, incorrectly so called as has been pointed out, for the purpose as therein stated "of determining whether the plaintiff was an employee of the defendant within the meaning of that term as used in the Workmen's Compensation Act." It is unnecessary to determine whether separate and distinct trials by jury of several defenses in bar could have been had against the objection of a party or whether in any case they ought to be permitted as matter of discretion. See St. 1913, c. 716, § 2. Ordinarily such separate trials would seem a hardship upon the parties and a burden upon the public treasury.

The facts in their aspect most favorable to the plaintiff, as shown by the whole record in both bills of exceptions, are that the plaintiff was under a general contract of employment, with the defendant for the year 1912 at a stipulated weekly salary as its buyer of millinery. She worked in the defendant's store in Boston and spent much of her time on the second and fifth floors, where were the showrooms and workroom, and every day visited the basement to meet jobbers. She had a regular lunch hour between 1 and 2, to do with as she saw fit. "The plaintiff further testified that on the day of the accident she, electing to take her lunch in the workroom on the fifth floor, sent her sister Elizabeth, who who was one of her assistants, out to purchase some food and two theater tickets for the evening performance at Keith's. Elizabeth returned with the food for lunch only, having forgotten the theater tickets, whereupon the plaintiff, after partaking of the lunch, decided to go out and purchase the theater tickets herself. About 20 minutes after one the plaintiff put on her street clothing, hat, gloves, and wrap, and with the express and sole intention of leaving the store to purchase the aforesaid theater tickets for herself and her mother, she entered the elevator on the Tremont street side of the store. * * * The plaintiff at this time was using the elevator to do an errand of her own in which the defendant was in no wise interested. While alighting from the elevator at the street floor on her way to the theater, the plaintiff received injuries * * * on account of the alleged negligence of the defendant company, its agents and servants." The elevator on which the injury occurred was in the store of the defendant and was used in common by its customers and employees. It is not disputed that the defendant was a subscriber under the Workmen's Compensation Act, subject to all the liabilities and entitled to all the rights accruing therefrom.

There is no evidence tending to show, and the plaintiff does not contend that she had given the notice required by part 1, § 5, of the act as a condition precedent in order to enable her to maintain an action at common law for injuries arising out of and in the course of her employment.

[5] The only reasonable inference of which these facts and the evi-

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dence are susceptible is that the injury to the plaintiff arose out of and in the course of her employment. She was within the store of her employer. The only occasion for her presence there at the time and place was the fact of her employment. When she entered the store on her way to work and pursued the proper course to the place of her labors, while there in the performance of her duties as employee and until she had left the store by the ordinary means of exit, she was engaged in the pursuit of her employment, entitled to the protection and subject to the limitations of the Workmen's Compensation Act. Numerous of our cases illustrate the principle that the sphere of employment exists and affords its shield to the employee while within the premises of the employer on the way to or on the return from actual performance of the specific duties of the employment. Sundine's Case, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318; Stacey's Case, 225 Mass. 174, 114 N. E. 206; O'Brien's Case, 228 Mass. 380, 117 N. E. 619; Uzzio's Case, 228 Mass. 331, 117 N. E. 349; Hallett's Case, 230 Mass. 326, 119 N. E. 673; Id., 232 Mass. 49, 121 N. E. 503. See O'Toole's Case, 229 Mass. 165, 167, 118 N. E. 303, and Rochford's Case, 234 Mass. 93, 124 N. E. 891. Several cases decided under the English act go quite as far as our own decisions in this direction. See, for example, John Stewart & Son (1912) Ltd. v. Longhurst [1917] A. C. 249; Moore v. Manchester Liners Ltd., [1910] A. C. 498. Charles R. Davidson & Co. v. McRobb, [1918] A. C. 304; Webber v. Wansborough Paper Co., Ltd., [1915] A. C. 51; Lancashier & Yorkshire Ry. Co. v. Highley, [1917] A. C. 352.

The plaintiff was leaving the store of her employer with the purpose of doing an errand on her own account having no relation to her employment. That fact is of no consequence under these circumstances. She was doing it on her own time and not on her employer's time. She was in this particular in the same condition as she would have been if leaving the store at the end of her labor for the day. She had a right under the terms of her employment to go out at the lunch hour on her own affairs. She was as much within the scope of her employment as were any of the employees in the cases cited where they have been held within the protection of the act.

The case at bar is distinguishable from Ross v. John Hancock Mut. Life Ins. Co., 222 Mass. 560, 111 N. E. 390. In that case the plaintiff was leaving the public elevator in her employer's building, occupied by many other tenants as well as by itself, at a floor other than that of her employment or general place of exit on an errand of her own, and it was held that she had so far as concerned her employment left the premises of the employer. She was as much away as if in another office building to visit a friend. In the case at bar the plaintiff was using the ordinary means of leaving her employer's premises in the usual way, but had not left the part where her employment carried her. It follows that at the trial to which the first bill of exceptions relates, the fifth request of the defendant for a directed verdict in its favor on the ground that the plaintiff was an employee under the Workmen's Compensation Act at the time of the accident and received an injury, which arose out of and in the course of her employment, should have been granted.

The question submitted to the jury was this:

"At the time of the accident alleged in the plaintiff's amended declaration, was she an employee of the defendant?"

No objection appears to have been made to the form of the question. The jury returned this answer: "She was not."

[6, 7] The case then came on a second trial to a jury on the general issue. The judge directed a verdict in favor of the defendant. The plaintiff's exception thereto constitutes the second bill of exceptions. It is not necessary to decide whether there was error in this ruling on the evidence set forth in that bill of exceptions on the assumption that the

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finding of the jury had at the first trial must stand, for the reason that, if there was, the plaintiff has suffered no harm. A verdict should have been directed on all the evidence disclosed in both bills of exceptions on the grounds already stated, viz. that, the plaintiff being an employee of a subscriber under the Workmen's Compensation Act and not having taken the steps necessary to retain her rights to an action at common law, and the injury having been received and having arisen out of and in the course of her employment, she could not maintain an action at common law. This ground in its essence is fatal to her right to recovery on the merits in an action at common law. As it seems to us, in the wise exercise of sound discretion there would have been but one trial involving all issues in bar of the plaintiff's claim. If that course had been pursued, a verdict should have been ordered for the defendant on all the evidence for the reasons stated. Without deciding, however, that issues of substance never can be divided and tried separately to a jury, it is enough to say that, as matter of correct rulings of law, a verdict should have been directed in favor of the defendant on the first trial and then there would have been no second trial. But the second trial having been had and a final verdict having been rendered which was right in its result, it need not be disturbed. The defendant's exceptions must be sustained and judgment ordered in its favor under St. 1909, c. 236. It is familiar law that a right ruling will be sustained although a wrong reason was given. Randall v. Peerless Motor Car Co., 212 Mass. 352, 384, 99 N. E. 221. Although the direction of the verdict at the second trial does not fall within the letter of this rule, it comes within its spirit and its substance. It accomplished the result which is inevitable on the whole record. The entry may be

Defendant's exceptions sustained and judgment entered for defendant under St. 1909, c. 236, and plaintiff's exceptions overruled.

So ordered.

BLOZINA v. CASTILE MINING CO. (No. 79.)

(Supreme Court of Michigan. June 7, 1920.)

178 Northwestern Reporter, 57.

1. MASTER AND SERVANT—COMPENSATION CLAIMANT, ALLEGING DEPENDENCY, PRESUMED SUPPORTED BY EARNINGS OF, INSTEAD OF RENT RECEIVED BY, DECEASED SON.

Relative to whether claimant under Workmen's Compensation Act, dependent on deceased, his son, received his support from the son's earnings or the rent of the son's house, it is a fair inference, in the absence of proof, that expenses of and indebtedness on the house, paid by the son, were paid with the rent.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT—COMPENSATION COMMISSIONER'S REPORT HELD INCOMPETENT, AS HEARSAY.

Hearsay statements in report of deputy commission, appointed by Industrial Accident Board under Comp. Laws 1915, § 5472, to make investigations, are not competent evidence.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

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3. MASTER AND SERVANT—COMPENSATION AWARD, BASED ON HEARSAY EVIDENCE, WILL BE REVERSED.

While the Industrial Accident Board will not be reversed for admission of hearsay evidence, if there is any proper evidence to support its finding, there being nothing but such incomepetent evidence, its finding must be held unsupported.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—COMPENSATION LIMITED TO "DEPENDENTS ON EARNINGS."

By provision of Comp. St. 1915, § 5435, only "dependents on earnings" of deceased employee are entitled to award under Workmen's Compensation Act; and this is unaffected by section 5443, providing that no saving or insurance of the injured employee shall be considered in determining the compensation.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Certiorari to Industrial Accident Board.

Proceeding under the Workmen's Compensation Act (Acts Ex. Sess. 1912, No. 10) by Peter Blozina, for death of her son, opposed by the Castile Mining Company, the employer. Award was made by the Industrial Accident Board, and the employer brings certiorari. Award set aside, and the case remanded.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, and Bird, JJ.

Belmont Waples, of Ironwood, (Harold J. Waples, of Ironwood, of counsel), for appellant.

Fred F. Murphy, of Iron River, for appellee.

FELLOWS, J. Certiorari to the Industrial Accident Board. The case was heard on a stipulation of facts signed by the attorneys for the parties, from which it appears that Anton Blozina, son of claimant, was an employee of defendant, and met an accidental death arising out of and in the course of the employment. His wage was 4.80 per day. He contributed $45 per month to the support of claimant, who was unable to work and support himself. Deceased was the owner of a building at Caspian, which rented for $45 per month; there was a mortgage upon it of $650, and there was also due, for material and labor which went into its construction, $1,550. Insurance and taxes for the year prior to his death, and which were paid by him, amounted to $127.73. A deputy commissioner, who had a conference with the parties prior to the submission of the matter to arbitration, with a view to adjusting the differences, made a report to the board, stating that the year prior to death deceased paid $350 on the mortgage, reducing it to the amount of $650. There was no statement of this fact in the stipulation, and nothing before the board on this subject, other than this report.

Defendant insisted before the board, and here insists, that under our statute (section 5435, C. L. 1915), which is similar in language to the statutes of some of the states and dissimilar to others, dependents entitled to compensation under the provisions of the acts are those who are dependent upon the "earnings" of the deceased employee; the language of the section being, "wholly dependent upon his earnings for support at the time of the injury," and only partly dependent upon his earnings for support at the time of his injury." It is argued that, the statute having fixed the dependency as a dependency upon "earnings," the burden rests upon claimant to show such dependency in order to entitle him to compensation,

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and that in the instant case he has not discharged such burden; that deceased received an income from the rent of the building in the same amount as was devoted to his father's support; and that it is conjectural and speculative as to whether such support came from rent of the building or from earnings as a laborer.

The Industrial Accident Board, without specifically deciding the question of the construction of the statute, held that it could consider the report of the deputy commissioner as evidence of the facts therein stated; and, accepting the statement that deceased paid $350 on mortgage, inferred that the income from the building was entirely devoted to the expenses of and indebtedness on the building, and concluding that the claimant was wholly dependent upon the earnings of deceased and awarded him the maximum.

[1-3] We agree with the board that it was a proper inference to be drawn, in the absence of proof, that the income from the building was first devoted to the building. In the absense of proof, we think it proper to charge against the income from the building its expenses and interest charges upon the indebtedness upon it, including the indebtedness for labor and material, as also all sums paid upon the mortgage, and if the rent from the building was exhausted by such charges and expenses, it is then obvious that claimant received his support from the earnings of deceased. The board, however, based its finding that $350 had been paid on the mortgage solely on the statement of the deputy commissioner to that effect. By section 5472, C. L. 1915, the board is empowered to appoint not to exceed two deputy commissioners and the section empowers them to make investigations, etc., but the section does not make their report evidence, and it is difficult, if not impossible, to perceive its binding force upon either party. The statements contained in it are hearsay, and while we do not reverse for the admission of hearsay testimony, and do affirm where there is any proper testimony to support the finding, notwithstanding the admission of the improper evidence in the record to support the the finding is inadmissible hearsay evidence, we are bound to say as matter of law that the finding is not supported by the evidence—i. e., competent evidence. Ginsberg v. Burroughs Adding Machine Co., 204 Mich. 130, 170 N. W. 15.

[4] The Massachusetts act (chapter 751, St. 1911) contains the same language as to dependency as does our act; it also contains a provision similar to the provision found in our act in section 5443, C. L. 1915. In Derinza's Case, 229 Mass. 435, 118 N. E. 942, the Supreme Judicial Court of that state had under consideration the question of dependency of a wife living apart from her husband, and it was there said:

"The terms of our act award compensation to those dependent upon the 'earnings' of the deceased employee, and not to those supported by him, differing thus from the statutes of some other jurisdictions. See, for example, Crookston Lumber Co. v. District Court, 131 Minn. 27. Therefore in the case at bar the finding can be supported only if the wife could be found to have been totally dependent upon the earnings of her deceased husband, and not upon investments of his property. This is so, giving to 'earnings' the broadest meaning of which it reasonably is susceptible . Jenks v. Dyer, 102 Mass. 235. Chester v. McDonnald, 185 Mass. 54. The terms of part 2, §§ 7 and 12, the latter to the effect that 'no savings or insurance of the injured employee * * * shall be taken into consideration in determining the compensation to be paid ' under the act, do not modify and are not in any respect in conflict with the explicit and unequivocal provisions of part 2, § 6, and part 5, § 2, to the effect that dependency in case of death of an employee shall be ascertained solely with reference to the fact whether the claimants were wholly of partly dependent upon the earnings of the employee for support at the time of the injury.'"

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Our attention has not been challenged to the decision of the court of last resort of any other state having similar provisions to ours, nor has our investigation led us to one where a contrary doctrine has been announced. Indeed, the question is not liable to arise with any degree of frequency. We are persuaded that we should follow the holding of the Massachusetts court. The language of our act expressly states "dependent upon his earnings for support." That the earnings of an employee are distinct and different from rent he receives for a building is patent. The Legislature of this state saw fit to use the precise language of the Massachusetts act and to purposely use the word "earnings." We may not eliminate it from our consideration, nor modify it by some other inapplicable portion of the act. The section under consideration deals exclusively with the question of dependency and is quite complete in itself.

It follows that the award must be set aside. The case will be remanded to the Industrial Accident Board, where the parties may introduce such further proof and take such further proceedings, not inconsistent herewith, as they may be advised. This was the course pursued in Derinza's Case, supra, and in Finn v. Detroit, etc., Ry., 190 Mich. 112, 155 N. W. 721, L. R. A. 1916C, 1142.

DEWEY v. DEWEY FUEL CO. et al. (No. 66.)

(Supreme Court of Michigan. June 7, 1920.)

178 Northwestern Reporter 36.

1. MASTER AND SERVANT—EMPLOYEE OF ANOTHER, WITHIN COMPENSATION ACT, HELD TO INCLUDE CORPORATE OFFICER WORKING AS EMPLOYEE.

A stockholder and president of a corporation engaged in the fuel business, who was employed by the manager as an employee in the yard at $2 per day and was carried on the payroll as an employee and obeyed the orders of the manager, was employed by another, within Workmen's Compensation Act, pt. 1, § 7, so as to entitle his widow to compensation for his death.

(For other cases, see Master and Servant, Dec. Dig. § 361)

(For other definitions, see Words and Phrases, First and Second Series, Employed.)

2. MASTER AND SERVANT—COMPENSATION ARBITRATOR HELD ELIGIBLE THOUGH HE BECAME CLAIMANT'S ATTORNEY.

The fact that an arbitrator in a proceeding under Workmen's Compensation Act acted as attorney for claimant several weeks after the arbitration had ended did not render such arbitrator ineligible under a rule promulgated by the Compensation Board excluding persons as arbitrators who are financially interested in the outcome of the case.

(For other cases, see Master nd Servant, Dec. Dig. § 398½; New, Vol. 8A Key-No. Series.)

Certiorari to Industrial Accident Board.

Proceedings by Henrietta E. Dewey under the Workmen's Compensation Act to obtain compensation for the death of her husband, opposed by the Dewey Fuel Company. the employer, and the Southern Surety

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Company. There was an award of compensation, and the employer and Surety Company bring certiorari. Award Affirmed.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Walter M. Nelson, of Detroit, for appellants.
Forrest C. Badgley, of Jackson, for appellee.

BIRD, J. Plaintiff claims that her husband, while in the employ of the Dewey Fuel Company, met his death under circumstances which entitle her to an award under the Workingmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10). Liability is denied by defendants on the grounds:

(a) That neither the injury nor the death of Mr. Dewey was caused by an accident arising out of his employment.

(b) That the injury and death were the result of intentional and willful misconduct.

(c) Because one of the arbitrators was not a disinterested party within the meaninig of the rules of the commission.

[1] (a) The material part of the testimony bearing upon this question is that plaintiff was a stockholder in and president of the defendent fuel company. He served as president without salary. Being unfitted for office of executive work, and desiring to be employed, he accepted a place as an employee in the yard at $2 per day and was carried on the payroll as an employee. He was called a yardman. His work was principally to assist the drivers in loading their wagons at the yard. On the morning of the accident the deceased was ordered by the manager to go to another part of the city, where defendant had some wood stored, to pile and measure a quantity and get it ready for the drivers. On his way there, while crossing a street, he was run into by a passing automobile, knocked down, and run over, resulting in injuries which caused his death. The argument of appellants is that the deceased was not an employee within the meaning of the Compensation Law because he was an employer; and this argument is based upon the fact that he was a stockholder and president of the company.

Had the deceased been engaged at the time in executive work as an officer of the company and had done this work incidentally to his own, there might be some basis for arguing that he did not, as an employee, come within the act; but those were not the facts. The deceased was regularly engaged as an employee with the title of "yardman," doing the work of an employee, paid as an employee, and subject to the orders of the manager as an empolyee, and when struck by the automobile he was on his way to do some work as an employee in obedienec to the orders of the manager. The mere fact that back of this employment he was a stockholder of the company and acted as its president could not alter the character of his employment. Neither his status as a stockholder nor his position as president obligated him in any way to perform the work of an employee. Had the company not been an artificial person, the argument might be more plausible that he was working for himself, but, when he was employed by the manager of a legal entity we think he was employed by another within the meaning of the act. Part 1, § 7, of act 10, Laws 1912. The confusion which arises from the closeness of the relation between the deceased and the corporation clears up very rapidly when one considers that the company had a legal entity which was as distinct as that of the deceased, for the purposes of owning property and controlling its affairs. Our conclusion is that the board was justified in reaching the conclusion it did upon this question.

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(b) We have read, with some care, the circumstances under which the deceased collided with the autmomobile and we see nothing in them in any way indicating that he intentionally or willfully put himself in the way of the machine.

[2] (c) A rule promulgated by the Compensation Board excludes persons as arbitrators who are finanacially interested in the outcome of the case, and persons who are so nearly related to the parties that they may be fairly deemed to be financially interested in the decision. 1916 W. C. C. p. 404.

Appellants insist that, because Mr. Forest C. Badgley, who was one of the arbitrators, afterwards represented the widow on appeal before the Accident Board the rule was violated and the award made invalid. It appears from the statement of Mr. Badgley, who is a reputable attorney, that he was invited by appellants to act as an arbitrator in the case; that he accepted and sat with the other arbitrators and joined in the award; that he had had no previous acqaintaince with claimant prior to the day the arbitration began; that he first met her on that day at the arbitration; and that he had never done any business for her. We fail to see how the fact that Mr. Badgley acted for claimant several weeks after the arbitration had ended could have any influence upon his judgment several weeks prior to that time. Nothing has been made to appear of record that would lead us to any such conclusion.. We think the objection is without merit.

Finding no error in the record the conclusion of the Accident Board will be affirmed, with costs to the plaintiff.

NIXON v. FURNITURE MFRS.' ASS'N et al. (No. 32.)

(Supreme Court of Michigan. April 1, 1920.)

117 Northwestern Reporter 957.

MASTER AND SERVANT—PETITION FOR RELIEF FROM PAYMENT OF COMPENSATION DISMISSED.

A petition by employer, seeking to be relieved from further payments of compensation, held properly denied, where the proof showed that, although the employee had not fully recovered, he worked about a week, receiving full wages, and then left, but did not show his earnings thereafter.

(For other cases, see Master and Servant, Dec. Dig. § 419.

Certiorari to Industrial Accident Board.

Proceeding under the Workmen's Compensation Act by Guy Nixon, employee, against the Furniture Manufacturers' Association' employer, and others. The Industrial Accident Board approved the parties' agreement as to compensation, under which payment was made until the employee left the employment, after which respondents asked relief from further liability. The board dismissed their petition, and respondents bring certiorari. Order and finding affirmed in part, and eliminated in part.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird and Sharpe, JJ.

Francis D. Campau, of Grand Rapids, for appellants.
Glenwood C. Fuller, of Grand Rapids, for appellee.

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CLARK, J. On April 9, 1919, appilcant, Guy Nixon, sustained an accidental personal injury arising out of and in the course of his employment with respondent Furniture Manufacturers' Association. An agreement in regard to compensation was entered into between the parties and approved by the Industrial Accident Board, and compensation was paid thereunder from the date of the accident to June 24, 1919. On June 25, 1919, applicant returned to his employment, when, as stated by employer's foreman, he was "not in shape to work" and not able to do the work he had been doing when injured, but was permitted to do light work, which he did for about one week. He then left the employment with said respondent. On September 12, 1919, respondents filed with the board a petition alleging that full compensation had been paid and asking to be relieved from further liability in the cause. A hearing was had September 30, 1919 That applicant was employed or received wages subsequent to his employment with said respondent there was before the board no competent evidence, as distinguished from hearsay.

Dr. Webb examined applicant about five weeks before the hearing and said that applicant was then not fully recovered, but was able to do light work, that a full recovery was to be expected, and that he advised applicant to work. The board, not ordering further proof, in order that the facts necessary to a decision upon the merits might be before it, in the exercise of its discretion, made an order and finding from which we quote:

"That on or about June 25, 1919, the applicant resumed employment, although he had not fully recovered from the effects of the accidental injury he sustained, and that he worked about one week, receiving full wages for said period, and then left the respondent's employ.

"That the proofs do not show the earnings of the applicant since he was last in respondent's employ, and the board is therefore not in a position to determine at this time whether or not any compensation is due in the case.

"It is therefore ordered and adjudged that said petition should be and the same is thereby denied."

The part of the order and finding above quoted is affirmed. The remaining portion of the order and finding, being in part inconsistent, and in part merely declaratory of the statute, will be eliminated

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STEIN v. PACKARD MOTOR CAR CO. (No. 90.)

(Supreme Court of Michigan. June 7, 1920.)

178 Northwestern Reporter 61.)

1. MASTER AND SERVANT—COMPENSATION CLAIM HELD INSUFFICIENT.

Where an injured employee made no claim for compensation within the time limited by Workmen's Compensation Law, pt. 2, § 15, except that in a conversation with the doctor of the employer he inquired as to whether he would be paid for the time lost, and being informed that he would not be paid arranged to return to work after an absence of seven days, such conversation did not constitute a claim, though the statute does not in terms require claim in writing.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

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2. MASTER AND SERVANT — EMPLOYER HELD NOT ESTOPPED FROM URGING FAILURE TO MAKE TIMELY CLAIM FOR COMPENSATION.

An employer who furnished an injured employee with medical attention and gave him light work as soon as he was able to do anything, paying him the same wages as before, was not thereby estopped from urging the employee's failure to make timely claim.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Certiorari to the Industrail Accident Board.

Claim by Charles Stein for compensation under the Workmen's Compensation Laws against the Packard Motor Car Company. The Industrial Accident Board awarded compensation, and the employer brings certiorari. Award reversed.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Beaumont, Smith & Harris, of Detroit, for appellant.
Behr & Coolidge, of Detroit, for appellee..

BROOKE, J. On March 4, 1918, claimant received injury arising out of and in the course of his employment. The injury consisted in the breaking of both bones of left forearm. Claimant was at once taken to the office of Dr. George, at the company's plant. (Dr. George devotes his time to the treatment of defendant's injured employees, and is in charge of defendant's compensation department.) The arm was put in a splint, and was set the following day at Harper Hospital under a fluoroscope. Claimant carried his arm in a cast.

On the eighth day after the injury, he returned to work, and from that time up to the date of the hearing before the Industrial Accident Board he continued in the employment of the respondent, earning wages as great or greater than he received at the date of his injury. He made a claim in writing for compensation on December 10, 1918—nine months and some days after the receipt of the injury. Interrogated with reference to the written notice, he testified:

"Q. Was that the first one? * * * A. Yes, sir. * * *

"Commr. Reaves: Yes, 1918. There is our stamp, as we received it there, just to identify it. Did you ever make any claim to the Packard Motor Car Company prior to the time that you sent this in? A. No, before that I asked Dr. George what he could do about it, and he said he didn't think he could do nothing, so I went back to work. I said I couldn't lay around ten weeks and accept $2 a week, and so I went back to work and put in my time.

"Q. What did you say at that time? A. I asked him what they could do for the time I lost. He said they wouldn't do anything on account of not being off two weeks. I says I can't lay off. I says my arm is in a cast, and I can just as well sit there as sit home, so I went out there and and did all I could with one hand and got my pay for it.

"Q. Do you remember the exact words you used at that time to Dr. George? A. That is about what I told him.

"Q. Asked him what they were going to do about it? A. I asked him what they were going to do about the time I lost. He said I didn't lay off two weeks. I said, 'I can't lay off two weeks just to wait for it,' and so I went in on the eighth day.

"Q. Did you ever say anything about it to him after that? A. No; he is the only man I talked with about it. He told me that. That is all I thought I could get.

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"Q. After December 10, you filed your claim with us? A. Yes.

"Q. Did you file claim at the same time with the Packard Motor Car Company? A. Yes, sir.

"Q. Filed the original with them and copy with us? A. Yes, sir.

"I think that is all.

"By Mr. Smith: Q. In your affidavit, Mr Stein, is that your signature there (indicating)? A. Yes.

"Q. Do you remember signing that at Mr. Coolidge's request? A. Yes.

"In this affidavit you say: 'Plaintiff further states that he was informed by said Dr. George, and likewise by an expert surgeon called in for consultation by said respondent, that the chances for success and of said proposed operation were far from sure. Plaintiff further states that at this time he first became aware of the fact that this injury was permanent, and that the condition of his arm would not improve; that he thereupon refused to submit to such operation, and promptly thereafter served and filed notice of claim for injury authorized under the Compensation Law of the state of Michigan.' This notice which has been called to your attention, you recall swearing to this in your affidavit?

"Mr. Coolidge: Is that sworn to?

"Q. Stated; you recall signing that statement? A. Yes.

"Q. And that is the first time you filed any notice with the Packard Motor Car Company or with the Accident Board under the compensation law? A. Yes, sir.

"Arbitrator Joncas: What is the date of that statement?

"Q. The statement is dated the 8th of February, 1919, and notice of the claim was dated December 10, 1918. That is your signature there? A. Yes, sir.

"Q. And that is the notice that was served on the Packard Motor Car Company at that time? A. Yes, sir.

"Q. And all you talked with Dr. George about just about the time of the accident was about your loss of time, as you stated? A. Yes; that is all.

"Q. Now— A. I didn't know at that time the way the arm was going to come out.

"Q. No, you didn't know that until after this session at the hospital when you talked about the operation? A. Yes, sir.

"Q. That is the first time you thought you ought to file claim against the company? A. He gave me good advice; my arm would be all right, so I went by his instructions, thinking it would turn out that way.

"Q. If it had turned out and you hadn't found out you couldn't get a guaranteed operation, you didn't have any intention of making a claim as you did, in other words? A. No.; if I Could use all my arm.

"Q. And the first time you got around and determined you wanted to make a claim was when they told you they couldn't guaranty it, and you made up your mind you didn't want to take a chance on the operation? A. Yes.

"Q. Now, I notice in this first part of December there is quite a little time lost there. Were you away,, or did you stop work, or what was that lay-off? A. December after the accident?

"Q. Yes. A. Yes; I had sickness at home in the family.

"Q. So you say that lay-off in the latter part of November and first of December was due to that sickness? A. Yes.

"Q. That is all.

Touching the same point, Dr. George testified as follows:

"Q. How long was Mr. Stein off at the time of the injury—off work —as far as you know? A. About a week.

"Q. Did you have any conversation with him at that time about the injury and about his working? A. Yes, he asked me if he was getting

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pay for the time he was losing, and I told him no, and that the compensation law did not apply unless he was out two weeks, and he suggested—while he thought the company ought to give him something because it wasn't his fault that he got hurt; under the circumstances he thought the best thing for him to do was to return to work if they would allow him to work out there at such work he could do with the plaster cast on.

"Q. Did he go back to work then? A. Yes, about a week after the arm was broken.

"Q. That is inside of two weeks he went back? A. Oh, yes; inside of two weeks he went back.

"Q. Did he state anything to you indicating any intent to make claim against the Packard for injury? A. No; he seemed satisfied. He was cared for right along."

Defendant having denied liability, an arbitration was held, which resulted in a denial of relief to claimant, the committee holding:

" * * * Charles Stein is not entitled to receive and recover compensation from said respondent, Packard Motor Car Company, as no claim for compensation was made within six months of the accident."

[1] The statute (section 15, pt. 2 of the Workmen's Compensation Law [section 5445, Comp. L. 1915]) provides:

"No proceedings for compensation for an injury under this act shall be maintained, * * * unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same. * * * "

The act does not in terms require that the claim for compensation be made in writing, and this court, has never so held. It is undisputed upon this record that no written claim for compensation was made by claimant until December 10, 1918, too late to comply with the statute; but it is urged that the conversation between claimant and Dr. George, as testified to by claimant, constitutes such a claim for compensation as would satisfy the statute, and it was so held by the board on appeal. We are unable to agree with this holding. It seems quite plain, upon a perusal of this testimony, that what claimant was seeking at that time was knowledge as to whether he would be paid for the time he was losing (seven days had already elapsed), and he was properly advised by Dr. George that under the law he would not be paid for that lost time; it being less than two weeks. It seems quite clear that he determined to make a claim for compensation only after he had refused to submit to an operation, for he testified:

"Q. And the first time you got around and determined you wanted to make a claim was when they told you they couldn't guarantee it, and you made up your mind you didn't want to take a chance on the operation? A. Yes."

We must hold, without considering the other two questions raised by appellant, that claimant is entitled to no relief. Brown v. Weston-Mott Co., 202 Mich. 592, 168 N. W. 437; Rubin v. Fisher Body Co., 205 Mich. 605, 172 N. W. 534.

[2] The claim that the defendant should be held to be estopped from urging claimant's failure to make his claim seasonably is without merit. Nothing was done by the defendant or any of its officers by act or word, so far as this record disclosed, to induce claimant to withhold the filing of his claim. Defendant gave him employment as soon as he was able to perform his work, and paid him as much or more than he received before. It afforded him the best medical attention possible. These humanitarian acts surely should not be held to work an estoppel in favor of claimant and against defendant.

The award of the board is reversed and held for naught.

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TANNER v. ALUMINUM CASTINGS CO. ET AL. (No. 95.)

(Supreme Court of Michigan. June 7, 1920.)

178 Northwestern Reporter 69.

MASTER AND SERVANT — COMPENSATION AWARD FOR DEATH FROM ACCIDENT HELD BINDING ON REVIEWING COURT.

In proceedings under Workmen's Compensation Act for compensation for death of employee, where there is evidence from which it can be inferred that the accident so reduced employee's vitality that he succumbed to an illness which caused his death, the court on certiorari will not disturb the Industrial Accident Board's finding that death resulted from the accident, though there is also evidence directly to the contrary.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Certiorari to Industrial Accident Board.

Proceedings under Workmen's Compensation Act (Laws 1912 [Ex. Sess.] No. 10) by Frances Tanner for compensation for death of Edward Tanner, opposed by the Aluminum Castings Company, employer, and the Hartford Accident & Indemnity Company, insurer. Compensation was awarded by the Industrial Accident Board, and the employer and insurer bring certiorari. Award affirmed.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Miller, Canfield, Paddock & Perry, of Detroit, for appellants.
Clarence Kellogg, of Detroit, for appellee.

CLARK, J. Frances Tanner, the applicant, is the widow of Edward Tanner, who on November 10, 1917 suffered an accidental personal injury arising out of and in the course of his employment with respondent Aluminum Castings Company. The Industrial Accident Board found that Mr. Tanner died on February 6, 1918, and that said injury was the proximate and contributing cause of his death, and that by reason of the general weakness and low vitality of the deceased as a result of such injury he succumbed to an illness which on January 20, 1918, showed pronounced and alarming symptoms. It is contended that there is no evidence to sustain this conclusion and none from which the required inference can be drawn.

"In proceedings under the Workmen's Compensation Act the Industrial Accident Board is trier of the facts, and it is not for the court, on certiorari, to review an award for the accidental death of an employee, to analyze, discuss or pass upon the arguments of counsel in support of their respective theories as to how deceased came to his death ,if the facts, disputed or undisputed, give opportunity for the board in its discretion to draw a natural and rational inference that his death resulted from an accident while engaged in his master's business within the scope of his employment." Gabriel v. A. J. Smith Construction Co., 206 Mich. 471 (quoting from syllabus), 173 N. W. 195.

The agreement for compensation between deceased and respondent insurance company was in effect at the time of the death, and compensation at the maximum amount had been paid to February 2, 1919. There was testimony that Tanner's injury had been caused by a bullet passing

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through the hand just below the wrist, striking the ulna bone and severing a small artery. Tanner held his wrist and had a handkerchief tied around it to prevent bleeding, but there was bleeding, a hemorrhage, spurting, but the main steady bleeding was venous. Dr. Gray, employer's physician, treated the wound, packed it with gauze to check bleeding, and put on a tourniquet. The doctor dressed the wound daily but every time he removed the dressing the hemorrhage would start. The doctor had Tanner taken to Harper Hospital that the severed blood vessel might be ligated, but the operation was delayed several days, during which time there was bleeding, and on November 18th an artery let go, the bleeding became active, and the doctor at once ligated the artery. There was some bleeding for a number of days after the operation. Of the bleeding before going to the hospital a witness said, "The blood just spurted all over everything," and that it took about 15 minutes to get it stopped; and another witness said, "The blood was spurting all over the rug and stained the tablecloth." The wound became infected and there was a discharge from it. The arm was packed in ice the first few days at the hospital and it was swollen, as one witness said, "away up above the elbow." Tanner left the hospital November 20th, and was confined to his home for about two weeks, during which time, applicant stated, there was a continuous discharge from the wound and the doctor came every day and dressed it, and after two weeks the wound seemed to be healing and the swelling began to go down and the doctor did not come so often. Tanner began walking about. He was weak, not strong as he had been before the accident. He became ill January 20, 1918, and died February 6, 1918. Three or four weeks before his last illness the wound had not healed because of the infection and the doctor had continued the dressings. Dr. Wallace. who attended in the last illness, gave the cause of death as lobar pneumonia. Dr. Gray, employer's physician, testified:

"A. * * * I understand that you wanted to know whether he would be more apt to acquire the disease in the first place on account of having this accident, and if he would be more apt to die if he did acquire the disease on account of his having this accident previously.

"Q. Well, let's divide that in two questions. In the first place, would he be more apt to acquire the disease? A. I think he would.

"Q. The second question is, Would he be more apt to succumb? A. Of course, his vitality was somewhat—was somewhat lowered, and his chances for recovery, of course, would be better if he had been in real good physical condition at the time.

"Q. Yes; and had not suffered this wound. A. No question about that. It is just the matter of degree. * * * I wasn't notified right away when he was taken sick (January 20, 1918), because they called in their family doctor, and it was within a week after he was sick that I saw him.

"Q. How did you come to go up there, doctor? A. Well, I was informed that he was sick. I think Mrs. Tanner 'phoned to me that he was sick, but I don't remember whether I heard it over at the plant besides that, or not. Anyway, I called on him at that time.

"Q. Well, you were interested in the case A. Yes, sir; certainly.

"Q. And that interest arose by reason of this accident; you were somewhat concerned over his injury? A. Yes, sir.

"Q. Up to that time? A. Yes, sir."

After an autopsy Dr. Moll said lobular pneumonia was not the cause of the death; that in one lung there was a congestion of a hypostatic character; that "hypostatic pneumonia might have been the result of septicæmia"; that "the man died from degeneration and weakening of the heart muscles"; and that "he died of degeneration of the heart, a large hypertrophied heart." Dr. O'Neil, who assisted in the autopsy, after telling of what was found, said:

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"Q. Doctor, if the deceased, prior to the 10th day of November, 1917 was a man in ordinary health and able to perform the usual work of an ordinarily healthy man, and while employed in one of the Detroit factories was shot in the right hand so that the bullet would cut one of the arteries of the wrist, and that after that shot he continued suffering from the result and died on the 8th day of February following, would you be able to state from the conditions found on the autopsy whether the conditions that you describe were the result of septicæmia following the wound in the wrist and hand? A. It might follow septicæmia; yes; if that condition existed there, if that condition existed there.

"Q. Could septicæmia produce the conditions that you describe? A. I think it could."

We are not unmindful of the evidence in the record directly contrary to that above reviewed, but, finding such evidence in the record, we cannot say that there was before the board no evidence from which it might properly infer that the death resulted from the accident.

The award is affirmed.

THIER v. WIDDIFIELD et al. (No. 11.)

(Supreme Court of Michigan. June 7, 1920.)

178 Northwestern Reporter 16

1. MASTER AND SERVANT—DEATH BY LIGHTNING HELD NOT INJURY ARISING OUT OF EMPLOYMENT WITHIN COMPENSATION ACT.

Evidence that lightning struck the employer's house and that employee was killed while standing near an electric light wire in the barn, which was not struck, *held* insufficient to warrant a finding by the Industrial Accident Board that the lightning followed the wire from the house to the barn and killed him, and that he was thereby exposed by his employment to greater danger from lightning than the community in general.

(For other caes, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—DEATH BY LIGHTNING "ARISES OUT OF EMPLOYMENT" ONLY IF ESPECIALLY EXPOSED BY EMPLOYMENT.

Death of an employee by a stroke of lightning results from injury arising out of employment only in case the employment is such as to expose the employee especially to danger from lightning more than the danger of the community in general.

(For other cases, see Master and Servant Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

3. MASTER AND SERVANT — COMPENSATION CLAIMANT HAS BURDEN OF PROVING INJURY ARISING OUT OF EMPLOYMENT.

An applicant for compensation under Workmen's Compensation Law has the burden of furnishing evidence from which an inference can be

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legitimately drawn that the accident arose out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Law by Violet B. Thier against Henry W. Widdifield, employer and the Ætna Life Insurance Company, insurer. The industrial Accident Board awarded compensation to applicant and employer and insurer bring certiorari. Award reversed and vacated.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

C. W. & W. S. Foster, of Lansing, for appellants.
Rollie L. Lewis, of Charlevoix, for appellee.

STONE, J. The applicant, who is the widow of William C. Thier, deceased, made application for compensation as a dependent, under the Workmen's Compensation Law (Laws 1912 [Ex. Sess.] No. 10). There is no question that both the employer and employee were subject to that law. It was admitted that the Ætna Life Insurance Company had insured Henry W. Widdifield, the employer in the case, which insurance was in force at the time of the accident; that the deceased was in the employ of Widdifield at the time of his death; that the employer had due notice of the accident, and that claim for compensotion was duly made; and that deceased was earning $18 per week at the time of his death, on June 3, 1919.

About 4 o'clock in the afternoon of that day said William C. Thier was struck by lightning, and instantly killed, at Charlevoix, Mich. Widdifield was there engaged in the ice, coal, and wood business, in the conduct of which he maintained a barn and an icehouse which were about 25 feet apart, the barn being about 75 feet from his dwelling house, and connected thereto by an insulated electric light wire from which entered the barn about 6½ feet from the ground. Thier's duties were to help deliver ice to customers, and to work on the wagon. It appeared that on the day referred to the deceased and his employer had been engaged drawing ice. Widdifield testified (and it was not disputed) as follows:

"We had just gotten through drawing a load of ice. We were going to start down to the coal shed for a load of coal, and we saw this storm coming, and I said: 'I guess we will unhitch and put the team in the barn and see what it is going to do.' We had just nicely got the team in the barn, when this bolt of lightning came and struck him."

Having taken care of the team by putting it in the stalls, both the employer and the employee were waiting in the barn for the storm to subside, when Thier, who was standing in the doorway, was struck by lightning and killed. When struck he was leaning beside the door, within a few inches of the place where the electric light wire entered the barn. He at the time was not performing any of the duties incident to his employment. He selected his own position, and had not been asked or directed to stand in that place by Widdifield, who was standing 4 or 5 feet behind him, and who was jarred by the stroke of lightning, but not knocked down. It was a very unusual and severe electric storm. During the storm a number of buildings belonging to other people, in the vicinity, also trees in front of another house were struck by lightning. One of such buildings was just across the street from Widdifield's house, another

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across the street and north—all within a radius of one-half mile. A tree standing 6 feet from Widdifield's house was struck by lightning during the storm, but the branches touching the house were not damaged. The dwelling house was struck, but neither the barn nor icehouse was struck. Widdifield testified that he thought the fuses in the house were not burned out, but that several lights in the house were burned out. The electric light wires in the barn lighting system were not injured, and the switch in the barn was not damaged. There was a slight burn found upon the lip of the deceased after death.

The claim of the widow was allowed by the committee on arbitration, with compensation at $9 per week for 300 weeks, and this was affirmed on review by the full boord. The respondents have brought the case here by certiorari, claiming that there was no evidence that death arose from accidental injury "arising out of" the employment.

It is said by appellants that the one legal question involved is:

"Did the death of William C. Thier by lightning stroke, arise out of his employment within the meaning of the Workmen's Compensation Law?

In the findings of the board, after referring to and quoting from the case of Klawinski v. Lake Shore, etc., R. Co., 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342, and claiming to distinguish that case, the following conclusion is reached, and language used:

"Taking into consideration all of the circumstances, it seems to us that the only reasonable conclusion is, that the lightning which struck the house, damaging the electric lights followed the electric wire to the barn, and struck and killed the deceased.

"Under the conclusion which we reach as to the facts, we are of the opinion that this case is not governed by the Klawinski Case. We believe this is a case where the industry through the agency of man combined with the elements to produce injury to the employee. This deceased being in the course of his employment at a point within a few inches of an electric wire, which was there as part of the industry and being the agency of man, contributed to the hazard and made his position more hazardous than that of others in the same community; that the decedent by reason of his employment was thereby exposed to injuries from lightning, other than the community in general in that locality, and in consequence thereof met his death. After the full consideration of the testimony and of all the files and proceedings had in the case, the board finds that the deceased, William C. Thier, suffered an accidental injury within the meaning of the act, from which death resulted; and that the accidental injury arose out of and in the course of decedent's employment. * * * From the foregoing it follows that the award of the committee of arbitration should be, and is hereby, affirmed, and applicant is entitled to receive and recover from both the respondents the sum of $9 per week for the period of 300 weeks, under the provisions of the Workmen's Compensation Law; and an order to that effect will be entered.' '

(1) A careful reading of the testimony contained in this record leads us to differ from the conclusion reached by the board. We are unable to find any evidence to warrant the finding "that the lightning which struck the house, damaging the electric lights, followed the electric wire to the barn, and struck and killed the deceased." Nor do we find any evidence to warrant the finding that the position of deceased was "more hozardous than that of others in the same community; that the deceased by reason of his employment was thereby exposed to injuries from lightning, other than the community in general in that locality, and in consequence thereof met his death." With due deference to the opinion of the board, we think the findings above referred to were based upon mere conjecture and speculation.

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[2] In our opinion the case is ruled by Klawinski v. Lake Shore, etc., R. Co., supra. In that case Mr. Justice McAlvay, in an opinion concurred in by all members of this court, said:

"It is our opinion that in the instant case claimant's husband did not come to his death as the result of a 'personal injury arising out of and in the course of employment,' within the meaning of the Workmen's Compensation Law. It is clear from the stipulated facts that this injury was in no way caused by or connected with his employment through any agency of man which combined with the elements to produce the injury; that plaintiff's decedent by reason of his employment was in no way exposed to injuries from lightning other than the community generally in that locality."

In the recent case of Ginsberg v. Adding Machine Co., 204 Mich. 130—137, 170 N. W. 15, 18, Justice Fellows used the following language in a case arising under this statute.

"If an inference favorable to the applicant can only be arrived at by conjecture or speculation the applicant may not recover. So if there are two or more inferences equally consistent with the facts, arising out of the established facts, the applicant must fall. McCoy v. Michigan Screw Co., 180 Mich. 54; Draper v. Regents of University, 195 Mich. 449"—and further citing cases in other jurisdictions.

We have examined the cases known as the "Lightning Cases" in the British and American courts, cited by the respective counsel, and find, with one exception hereinafter mentioned, that they are all in accord with our holdings upon this subject. Among the American cases are the following: Hoenig v. Industrial Commission, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339; Griffith v. Cole Bros., 183 Iowa, 415, 165, N. W. 577, L. R. A. 1918F, 923; Wiggins v. Industrial Accident Board, 54 Mont. 335, 170 Pac. 9, L. R. A. 1918F, 932, Ann. Cas. 1918 E, 1164; State ex rel. People's Coal & Ice Co. v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344.

Compensation was denied in all of the foregoing cases except the last. This Minnesota case is the only American case where, under circumstances at all similar to the instant case, compensation has been allowed. In that case a driver for an ice company was required to follow a fixed route in substantial disregard of weather conditions, though permitted to seek shelter in times of necessity. When a severe rainstorm, accompanied by lightning was in progress, he left his team and went to a tall tree just within the lot line, either for protection or in the performance of his duties soliciting orders. Lightning struck the tree, and the same bolt struck him, and he was killed. It was held that the evidence sustained a finding that the death of the decedent was the result of an accident "arising out of" his employment within the meaning of the Workmen's Compensation Act of that state. That case has been criticized, and especially so in Griffith v. Cole Bros., supra. Referring to that decision the court in the Iowa case said:

"The vice in this decision seems to us to be that while it recognizes there must be more than the normal risk from lightning to which all are subject, and that the employment must necessarily accentuate the natural hazard from lightning, this is not followed to its logical end, and a recovery for injury by lightning is allowed where there was no such accentuation or abnormal risk. All that is requisite is that the employment be of such a nature as that in reason the employee is more exposed to hazards from lightning than is one in some other employment. Cases that hold a given accident from lightning did not arise out of the course of the employment recognize that such injury may be related to the employment. See Hoenig v. Commissioner, 159 Wis. 646, 150 N. W. 996,

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L. R. A. 1916A ,399. And so of Roger v. School Board, 1 Scots Law Times, 271, wherein it is said that:

"'To be struck by lightning is a risk known to all and independent of employment, yet the circumstances of a particular employment might make the risk not a general risk, but a risk sufficiently exceptional to justify its being held that the accident from such risk, was an accident arising out of employment.'

"And it has been rightly held that injury from lightning did arise out of employment where a telephone or telegraph operator was hurt by an electric shock received in the course of his work. Atlantic Ry. Co. v. Newton, 118 Va. 222, 87 S. E. 618. And so where a workman on a high scaffolding was kept at work during a storm. Andrew v. Industrial Society, 2 K. B. 32. * * *

"A lineman who while at his work is bitten by a snake will not be allowed to trace his injury to his employment, even though he would not have been bitten had he been elsewhere than where his employment called him. On the other hand, if he touch a live wire or is struck by lightning while repairing or putting up a wire, he may well claim that his injury is peculiarly due to his employment.

"'As was said in Kelly v. County Council, 13 B. W. C. C. 194, there must be evidence that the servant was exposed to a greater risk of being struck by lightning than if he had been working in a field or garden. In Robson v. Blakely, 5 B. W. C. C. 36, it is well indicated that the natural range of inquiry is, and said:

"'To what class of dangers does this man's employment expose him? * * * Suppose I say he is a collier. I may say his employment exposes him to the risk of having things fall upon him from the roof, to the danger of tumbling down a shaft, and so on. In short, there is a peculiar class of dangers which exist only for people who go down into mines.'

"It is further illustrated by employments which compel walking in the street, and remaining off the sidewalk, as to which it has been said that there is a peculiar exposure to hazard from moving vehicles. In one word, it all turns upon whether it may in reason be said that as distinguished from being hurt while employed the injury is due to the nature of the employment. As said, we do not deny that being struck by lightning may be reasonably traceable to the nature of the work done, but decide that it may not be done in this case.

In Tarpper v. Weston-Mott Co., 200 Mich. 275, 166 N. W. 857, L. R. A. 1918E, 507, Justice Brooke, speaking for the court, said:

"That the injury suffered by the employee must arise out of the employment as well as in the course of the employment is well settled by our own decisions. McCoy v. Screw Co., 180 Mich. 454; Klawinski v. Railroad Co., 185 Mich. 643; * * * Van Gorder v. Motorcar Co., 195 Mich. 588."

(3) The burden of furnishing evidence from which the inference can be legitimately drawn that an accident to a workman arose out of and in the course of the employment rests on the claimant.

We conclude by saying that, in our opinion, there is in the instant case no evidence tending to prove that the death was brought about by the extrahazardous nature of the employment. As was said by the English court, it is not enough for the applicant to say:

"The accident could not have been engaged in the employment, of if I had not been in this particular place."

The applicant must go further and say:

"The accident arose because of something I was doing in the course of my employment, and because I was exposed by the nature of my employment to some particular danger.

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We are constrained to hold that there is no evidence to support the finding of the board, and the award and order of the Industrial Accident Board is reversed and vacated.

STATE EX REL. KILE v. DISTRICT COURT, HENNEPIN COUNTY, ET AL. (No. 21775.)

(Supreme Court of Minnesota. May 28, 1920.)

177 Northwestern Reporter, 934.

(Syllabus by the Court.)

1. MASTER AND SERVANT—ONLY QUESTIONS OF LAW REVIEWABLE IN COMPENSATION CASES.

Only questions of law are reviewable by this court in cases arising under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

2. MASTER AND SERVANT—QUESTION OF LAW IN COMPENSATION CASE DEFINED.

Whether the evidence sustains a finding of fact does not become a question of law, unless all reasonable and impartial minds would reach only one conclusion.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

3. MASTER AND SERVANT — FINDING IN COMPENSATION CASE HELD CONCLUSIVE.

The finding that the relator was voluntarily living apart from her husband must stand, as reasonable minds might reach different conclusions in respect to the fact.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

4. MASTER AND SERVANT—EVIDENCE HELD INSUFFICIENT TO SHOW DEPENDENCY WITHIN COMPENSATION ACT.

The fact that she was voluntarily living apart from her husband removed the presumption of dependency, and the evidence shows no actual dependency within the meaning of the statute.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from District Court, Hennepin County; John W. Molyneaux, Judge.

Proceeding under the Workmen's Compensation Act brought by the parents of Oscar F. Kile, deceased, wherein Lizzie Kile, decedent's widow, intervenes. Compensation was awarded to the decedent's parents, and the widow brings certiorari. Affirmed.

Trafford N. Jayne, of Minneapolis, for appellant.

Chas. S. Allbright, of Minneapolis, Sp. Agent, Minn. Dept. of Labor, for Geo. Kile and others.

Kingman, Cross & Cant, of Minneapolis, for Royal Indemnity Co.

TAYLOR, C. Oscar F. Kile, while at work as a laborer in the city of Minneapolis, on July 3, 1919, sustained injuries which resulted in his death.

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His parents, with whom he had resided, filed a complaint in the district court of Hennepin county, setting forth that they were dependent upon him for support, and were persons entitled to compensation under the Workmen's Compensation Law (Gen. St. 1913, c. 84a). His widow filed a complaint in intervention, asserting that she was the person entitled to compensation under the law. The obligation to pay compensation was conceded, and the only controversy was whether it was payable to the parents or to the widow. The trial court found as a fact that the widow had voluntarily left her husband and had voluntarily lived apart from him for more than a year immediately preceding his injury and death, and rendered judgment awarding compensation to the parents. The widow brings the matter before this court by writ of certiorari, and contends that the evidence does not justify the finding that she was voluntarily living apart from her husband.

[1, 2] Only questions of law may be reviewed by this court in cases arising under the compensation statute. G. S. 1913, § 8225; State ex rel. Niessen v. Dist. Court, 142 Minn. 335, 172 N. W. 133. The question of whether the evidence sustains the findings becomes a question of law "only where an impartial consideration thereof, together with all reasonable and fair inferences, will lead reasonable minds to but one conclusion. If reasonable minds may reach different conclusions, the questions becomes one of fact, and the findings must be sustained." State ex rel. v. District Court, 176 N. W. 165; State ex rel. v. District Court, 142 Minn. 335, 172 N. W. 133.

In view of the findings the question for determination is whether there is any evidence from which a reasonable mind could reach the conclusion that she was voluntarily living apart from her husband. She had lived in illicit relations with one Alfred Malm in the city of Minneapolis for several years. In the early part of 1918, she went from Minneapolis to Kansas City, Mo., with Oscar Kile, where they lived together as husband and wife for some three months before they were married. They were married on May 7, 1918. and about three weeks later she returned to Minneapolis. There is evidence from which the court could find that she went to Minneapolis for the purpose of procuring a loan on some property she owned there, and with the understanding that she would return to her husband at Kansas City with this money, and that they would then go to Oklahoma. She sold her property, but instead of returning to her husband she went to Wisconsin, where she lived with relatives until April, 1919, when she returned to Minneapolis. A few letters passed between them shortly after she left Kansas City, the most important of which was a letter from her written June 16, 1918, to the effect that she could not live with him again unless he changed his ways. She testified that he was a heavy drinker and intimated that he indulged in gambling, but insisted that she did not leave him and return to Minneapolis on account of his habits but because she was sick and needed rest. He returned to Minneapolis and was employed in that city in the summer of 1919 but the date of his return is not given. She knew of his return and that he was living with his parents but so far as appears neither communicated with the other after the summer of 1918.

[3] We are unable to say that from an impartial consideration of the evidence reasonable minds could not reach the conclusion that she was voluntarily living apart from her husband and the finding must stand.

[4] The fact that she was voluntarily living apart from her husband simply removed the presumption of dependency created by subdivision (1) of section 8208 of the General Statutes of 1913 as amended (Gen. St. Supp. 1917, § 8208), but the evidence shows that there was no actual dependency as defined by subdivision (3) or subdivision (3a) of the same section.

Judgment affirmed.

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WILLIAMS v. SCHAFF.

(Supreme Court of Missouri, Division No. 1. April 10, 1920. Motion for Rehearing and Modification Overruled June 2, 1920.)

222 Southwestern Reporter, 412.

3. COMMERCE — EMPLOYEE, CONSTRUCTING NEW SEMAPHORE FOR INTERSTATE AND INTRASTATE COMMERCE, NOT WITHIN THE FEDERAL ACT.

Employees engaged in constructing a new semaphore and depot to be used in place of old structures in inter as well as intra state commerce do not come within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), for the improvements might be destroyed before completion and never be used.

(For other cases, see Commerce, Dec. Dig. § 27[8].)

4. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT EXCLUSIVE AS TO A CASE WITHIN IT.

In a case within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) the federal law is exclusive and supersedes the state laws on the subject.

(For other cases, see Commerce, Dec. Dig. § 8[6].)

6. APPEAL AND ERROR — DEFENDANT'S REQUEST FOR INSTRUCTION HELD NOT TO PRECLUDE CLAIM OF INAPPLICABILITY OF FEDERAL LIABILITY ACT.

Where the petition of a railroad laborer in one count relied on the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), and in another count on common-law liability, and the railroad company denied liability under each count, the fact that it requested on instruction that it was not liable at common law will not preclude it from attacking a judgment after trial on the theory that the federal act applied, where it also requested an instruction that it was not liable under such act.

(For other cases, see Appeal and Error, Dec. Dig. § 882[3].)

Graves, J., dissenting.

Appeal from Circuit Court, Pettis County; Hopkins B. Shain, Judge.

Action by James A. Williams against Charles E. Schaff, as receiver of the Missouri, Kansas & Texas Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. W. Jamison, of St. Louis, Montgomery & Montgomery and Carl S. Hoffman, all of Sedalia, for appellant.

Claude Wilkerson and Paul Barnett, both of Sedalia, and F. P. Sizer, of Monett, for respondent.

GOODE, J. This plaintiff, in an attempt to get on a freight train of the defendant company, fell under the wheels and his left arm and left leg were so badly mangled it was necessary to amputate them. The accident occurred February 19, 1917, at the station of McAlester in the state of Oklahoma. Only six days before plaintiff had taken employment from the company as a common laborer in the bridge construction and repair department but he had been in the service of the company previously for three or four months in the same department. The local headquarters of the department were at Muskogee, Okl., a town and station on

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defendant's railway 50 miles north of McAlester, and where the foreman of the bridge department hired plaintiff. Eight or ten miles south of McAlester is the station of Savannah, and to this station plaintiff, on February 18, 1917, was ordered by the general foreman of the department to go with a carpenter by the name of Hughes, to help Hughes in the construction of a semaphore, a device used by the railway company to signal trains. The general foreman said to plaintiff in Hughes' presence, "You will go with Mr. Hughes to Savannah to work on the semaphore signal." The company furnished Hughes a pass for the transportation of himself and plaintiff to Savannah. The pass was for "one carpenter and one employee, when presented with form 214—between stations on McAlester Dist." Said form notified "passenger conductors and train auditors that the form identified Hughes and one man" as entitled to use the pass from Muskogee to Savannah. The printed rules of the company regarding the use of passes were put in evidence, and one of them provided that no pass would be honored on a freight train not scheduled to carry passengers unless it bore on its back this endorsement: "Good on freight trains." Further, that passes must not be used for travel on personal business. Defendant was building a new depot at Savannah and a new semaphore to take the place of old one still in use.

The old semaphore was used for signaling both intrastate and interstate trains of the defendant company, as the railway lines of the company extend through several states, and it operates trains through them. At the time of the accident the new semaphore had not been put into use for any purpose; but when completed it would be one of a succession of semaphores along the interstate lines of the defendant company, just as the old one was and had been. Plaintiff and the carpenter Hughes, who is spoken of by plaintiff as a "straw boss," worked on the semaphore during the day of the 18th, and, not having finished it at the hour for quitting work, intended to continue their task the next day. Hughes said to plaintiff there "wasn't any place to stay in Savannah"; so they would run up to McAlester for the night and return to Savannah in the morning. Accordingly they took passage on a freight train and were carried to McAlester, the conductor treating the pass, when presented by Hughes, as authority to carry them. Plaintiff said he personally knew nothing of whether or not there was a hotel or other place to stop in Savannah and didn't look for one. They spent the night at a hotel or boarding house selected by Hughes, ate breakfast at a restaurant he selected and went to the depot to take a train back to Savannah. A freight train had been made up at North McAlester, two miles away, and it came along past the depot at McAlester at 8 o'clock, but did not stop. Hughes spoke to the engineer or some one in the engine as it passed, and then told plaintiff they (Hughes and plaintiff) would get on that train. Hughes caught the train near the front end; then said to plaintiff: "Come on; it is safe." Plaintiff attempted to get on; but when he caught, or caught at, a grabiron on the side of a car, the rocking of the train, which was running from five to ten miles an hour, according to diverse testimony, threw plaintiff off his balance, caused him to lose his hold of the grabiron, and he fell under the train and received the injuries we have stated. Plaintiff testified the train seemed to be going pretty slow, and he thought he could catch it; that he asked Hughes if it was safe before trying to get on, because he (plaintiff) did not know at what speed the train was running or whether it would be safe to attempt to catch it. He and Hughes had been waiting at the station since 7 o'clock, and the defendant company afterward paid plaintiff for that hour, which was the one when his day's work began. There was testimony that passes and orders like those Hughes was given for himself and plaintiff were honored on freight trains as well as on passenger trains. Hughes so testified—said he had used such free passes

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for from three to five years on all kinds of trains; had never been given a book containing rules about the use of passes; had used them "on everything that came along" going to and coming from work, and was never instructed not to ride freight trains with such a pass. It should be stated that in an accident which occurred during plaintiff's first employment by defendant his right arm was broken at the elbow and he was left crippled in that arm, so his use of it was not "very good." In his effort to clutch the grabiron he caught hold with his right hand, but failed to catch with his left; failed also to place his foot in the stirrup, and his hold by his right hand was jerked loose.

For convenience we have spoken of the Missouri, Kansas & Texas Railway Company as the defendant company. but the actual defendant is Charles E. Schaff, who was receiver of the company and operating its lines.

The petition was in two paragraphs of which the first was drawn on the supposition that the plaintiff was hurt while he was assisting defendant as a carrier engaged in interstate commerce, and hence the case was controlled by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665). The second paragraph stated a cause of action based on the theory that plaintiff's work when he met with the injury was in connection with defendant's intrastate business. The court instructed there could be no recovery on the second cause of action.

The only finding of negligence upon which the jury were authorized to return a verdict for plaintiff was that Hughes gave him a negligent order to get on the moving freight train. In addition to finding that averment had been proved, the jury were required to find the following facts: Plaintiff at the time of the injury was engaged in defendant's service, under the direction and control of Hughes; that Hughes was foreman over him at the time, and had authority to direct the movements of plaintiff in going about his work, and to and from it; Hughes was furnished with a pass for himself and one employee; plaintiff and defendant were, at the time, engaged in interstate commerce; in obedience to the order of Hughes, and in the scope of plaintiff's employment, he undertook to get on the train and was jerked loose from the grabiron, caused to fall under the train and injured; the order of Hughes, if given, constituted negligence; plaintiff's injuries were the direct result of such negligence order, and that plaintiff did not assume the risk of the hazard to which he was exposed.

Whether he assumed the hazard depended, the court instructed, on whether it was one ordinarily incident to the business and known and appreciated by plaintiff; but if plaintiff was not aware of the danger, and did not appreciate the risk of getting on moving freight trains, he did not assume the risk.

The court also instructed that if the jury found plaintiff was not engaged in defendant's business when hurt, but for his own convenience had made the trip to McAlester, and when hurt was seeking transportation back to his place of employment, plaintiff assumed the risk of boarding the train, and the verdict must be for defendant.

A verdict was given for plaintiff, and his damages assessed at $25,000. After judgment had been entered on the verdict, defendant took this appeal.

[1, 2] 1. The assignment of error for first attention is that plaintiff made no case for the jury, because the only act of negligence the jury was required to find, namely, the order of Hughes for plaintiff to get on a moving train, occurred when neither plaintiff nor Hughes was engaged in the business of defendant. If this assignment is good, plaintiff cannot recover on either the federal statute or at common law. According to the testimony of plaintiff himself, he was free to go where he pleased after the day's work was over and to select for himself a place to eat and

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sleep. Naturally he would defer, somewhat, to Hughes, his foreman, in choosing lodgings; but in doing so would not be acting under Hughes' authority as foreman, but simply under his influence. Defendant had neither agreed to pay plaintiff's personal expenses while in its service, nor had reserved any control over him in respect of his board and lodging. The custom is so general for employees of a railroad company when sent out for duty on the line to live where they work, in some boarding house or hotel, or in "bunk cars" of the company, that we may presume it was incumbent on plaintiff and Hughes to stay overnight in Savannah, if they could find a suitable place; that is, one of the kind commonly used by persons in similar employment. Therefore, unless it was reasonably necessary for them to go to McAlester to spend the night, they were not engaged in the work of the company while they were away; and the company is no more responsible for the accident to plaintiff than it would have been if they had gone to a dance at McAlester and the accident had happened during their return trip. The argument for plaintiff at this point leaves out of view the necessity of the trip, and takes for granted plaintiff and Hughes, whatever was their reason for going to McAlester, were acting in the scope of their employment when they started back after 7 o'clock, the hour when they were supposed to commence work for the day. But this was not so if they left Savannah on an errand of their own. The duty of plaintiff to obey the orders of Hughes as foreman was primarily to do so when at Savannah and at work on the semaphore; and Hughes would have authority over his movements at McAlester after 7 o'clock in the morning only in the event plaintiff had been forced to go there in consequence of inability to procure accommodation for the night at Savannah. The only evidence on this question was the testimony of plaintiff himself that Hughes said there was no place to sleep in Savannah. This testimony having been received without objection conduced to prove the necessity to hunt quarters elsewhere; and, for aught that appears, McAlester was as accessible as any place. Such being the condition of affairs, the pertinent inquiry is not as to whether plaintiff and Hughes were within their employment while traveling to McAlester, and while passing the night there, but whether they were engaged in defendant's service on the way back to their task, and after the hour for them to resume work had arrived.

The question of the necessity of the trip was not as pointedly instructed upon as it could have been; but an instruction given by the court of its own motion, fairly presented it, in the absence of requests by the parties for more definite charges. The requests of plaintiff required the jury to find the command of Hughes was given "in the due performance of his duties"; but did not require them to find the existence of the only condition under which the command would have been given in the performance of Hughes' duty, namely, that the parties had gone to McAlester because they could find no place to stay overnight in Savannah.

A refused request of defendant excluded a verdict for plaintiff if the jury found he "was required to provide and pay for his own board and lodging; had the right to select the place where he would board and lodge," and in the exercise of that right, went with Hughes to McAlester. Said instruction took no account of the possible necessity to go there; and, as far as it had any merit, was covered by the one we have summarized, given by the court of its own motion and denying a recovery if the trip was taken by plaintiff for his own convenience and not as incident to his employment.

In view of the evidence to prove there was no place in Savannah where Hughes and plaintiff could spend the night, we hold it was not shown beyond an inference to the contrary the parties were acting outside the scope of their duty to defendant when the accident happened.

The liability of an employer for injury to a workman in his service,

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where the workman is absent from the place of his task, depends, in instances like the present, on whether the absence was voluntary on the part of the workman and for some purpose of his own, or, for some reason, was involuntary and compelled; and one of the reasons may be the conditions at the spot where his task lay. Two contrasted cases present this proposition clearly. In one a minor had been killed by an exposed and charged electric wire running along a passage in the mine, while the deceased was returning at noon from a social call on a fellow workman. The defendant was held not to be liable for the accident on the theory that the deceased was a servant engaged in the master's work when killed; the court citing in support of the proposition, 1 Shear. & Red. Negligence, § 190; Wright v. Rawson, 52 Iowa, 329, 3 N. W. 106, 35 Am. Rep. 275; Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153. In the aspect of the case that the defendant had maintained a defective appliance in a place where it was dangerous, because the workmen were accustomed to assemble there, the court held there had been neglect which afforded ground for recovery. Ellsworth v. Metheney, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389. In the other case an employee was hurt by an explosion while he was eating lunch on a dry knoll some distance from where he had been at work. According to the habit of the workmen, and as the employer knew, he had gone to the knoll to eat because the part of the grounds where he was working was marshy. He was allowed to recover. Thomas v. Railroad, 108 Minn. 485, 122 N. W. 456, 23 L. R. A. (N. S.) 954. In the emergency, such as, according to the immediate hypothesis, the plaintiff and his boss found themselves, it was as good cause to leave Savannah for the night as was the marshy ground for the injured employee to go to the dry knoll to spend his dinner hour. In another case very similar to this one, an electrical engineer had gone out on a line of the defendant railroad company to work, and in the course of his duty was due the next day at the station where the headquarters of the department were to receive further orders. He desired to get in the previous evening, so he might obtain a night's rest, and to accommodate him the train conductor at the station where he had been working telegraphed the conductor of a freight train which would pass the station to "slow down" there so plaintiff could get aboard and be carried to headquarters. The conductor did not cause the train to "slow down" and, in endeavoring to catch the side of a car as it passed, the plaintiff fell under it and an arm and leg were cut off. A contested point therein, as here, was whether the plaintiff was engaged in interstate business when hurt; the railroad company arguing that he was not because, at the time, he was not engaged in any work at all for the company. In disposing of the proposition, the court declared it was the plaintiff's duty to get back to headquarters, and until his duties, begun in the morning, were concluded at night, he must be regarded as being engaged in interstate commerce; meaning, of course, that during the workday he was in the company's service, and as its trains were engaged in interstate transportation, the plaintiff was engaged in interstate commerce. The point of the plaintiff's freedom of action at the close of the day was pressed; but the court rejected it because, as he was under the duty to return to headquarters, he was still occupied for the company when he attempted to return by the freight train. Dumphy v. Railroad, 82 W. Va. 123, 95 S. E. 863.

That an employee, on his way to and from his work, and using in his movements the premises or an instrumentality of the master, which he is authorized to use, is at the time in the master's service and may recover, if hurt by any negligible defect in the property, on the ground of a breach of the master's duty to furnish a safe place or appliance, is a doctrine accepted by many courts. But if, when hurt, he is going away from his task on his own business, or returning to it after leaving it on

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his own business, and not from some kind of compulsion, the same courts rule the other way. There is discord, real or apparent, in the decisions, and the cases pro and con are collected in notes to King v. Mendota Coal Co., L. R. A. 1916F, 1220, and to Taylor v. Bush & Sons Co., 12 L. R. A. (N. S.) 853. And see Hartman v. Steamship Co. (D. C.) 244 Fed. 567. The court of last resort, in cases of injuries to employees of carriers engaged in interstate commerce, has declared on the subject as follows:

"In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty of his employment. See North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 260. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole; for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both." Erie R. R. Co. v. Winfield, 244 U. S. 170, 173, 37 Sup. Ct. 556, 557 (61 L Ed. 1057, Ann. Cas. 1918B, 662).

The same principle of liability will govern if the employee was forced away from the locality of his task and to get back there was directed by his superior to use an instrumentality of the employer, when the order to do so was negligent by reason of the instrumentality being dangerous to use, either from a defect or its operation. If Hughes and plaintiff were in service, as determined by the test we have pointed out, when the former directed plaintiff to board the moving train, then the case is like one heretofore decided by this court, where an employer was held answerable to an employee injured while he was obeying a negligent order of his foreman to board a train. Foster v. Railroad, 115 Mo. 165, 21 S. W. 916. See, too, York v. Railroad, 117 Mo. 405, 22 S. W. 1081; Herdler v. Range Co., 136 Mo. 3, 37 S. W. 115.

[3] 2. We have to determine next whether plaintiff was engaged, when hurt, in a task so closely connected with interstate commerce as to bring him within the provisions of the Federal Employers' Liability Act (Act Cong. approved April 22, 1908, 35 U. S. Stat. at L. 65, c. 149, as amended by act approved April 5, 1910 [U. S. Comp. St. §§ 8657-8665]). The statute makes a common carrier "liable in damages to any person suffering injury while he is employed by such carrier in such commerce"; that is, in commerce between any of the several states or territories as provided in the first lines of the act. The meaning of the words "while he is engaged by such carrier in such commerce," controls the decision of the question whether state law or the federal act determines, in a particular case, the liability of the carrier to an injured employee. A mass of adjudications has been made on the subject by state courts of last resort and federal courts of intermediate resort, and some of them favor the view that plaintiff was injured while employed by defendant in interstate commerce. Grow v. Oregon Short Line R. Co., 44 Utah, 160, 138 Pac. 398, Ann.Cas. 1915B, 481; Saunders v. Railroad, 167 N. C. 375, 83 S. E. 573. In the cited cases employees were killed while assisting to install on the lines of the defendant companies a system of automatic block signals similar, we understand, to the semaphore plaintiff was working on. The particular block of semaphore the deceased brakemen were helping to construct had not been completed or introduced into the general system of signaling devices. Nevertheless the courts thought the men were engaged in work connected with interstate commerce, because, in the first case, the portion of the system already completed was in use for signaling interstate trains, and the signaling block the deceased was engaged upon would be thus used when finished; and , in the second case, a new system of signals was in process of erection to take the place of an old system exactly the fact here, except that this plaintiff was helping to build a single semaphore to be substituted for an old one. Without referring to other cases to the

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same effect, but less like this case in their facts, we state that, notwithstanding the cogency of the reasoning of the opinions, the force of all of them as precedents appears to be broken by the most recent decisions of the Supreme Court of the United States on the subject. 1 Roberts, Fed. Liabil. of Carriers, § 485, p. 840. Where the carrier conducts both an intrastate and an interstate business, and its employees are occupied first with the one and then with the other, the relations of the particular work the employee is performing when hurt to the interstate business of the carrier, is resorted to as one criterion of whether the federal statute controls, and is the decisive criterion, we think, when the facts are like those before us. And in settling the tests of the application of the statute the courts have been forced to make close distinctions: According to the latest judgments of the Supreme Court of the United States, it is not essential that the appliance the injured employee was working on at the time was or had been itself actually in use as a means of interstate commerce, or it was "so closely connected therewith as to be a part of it," to quote the language of the opinion in the Pedersen Case, 229 U. S. 146, 151, 33 Sup. Ct. 648, 649 (57 L. Ed. 1125, Ann. Cas. 1914C, 153). That plaintiff was injured through the negligence of a coemployee under these circumstances: A bridge over which interstate trains passed was in process of repair, and the repairs consisted in taking out an old girder and inserting a new one. A person had to pass over an intervening temporary bridge to reach the old one, and the temporary bridge was in use, too, for interstate trains. While carrying a sack of bolts over the temporary bridge to the one undergoing repair Pedersen was negligently run down by an interstate train. He was held to have been engaged in interstate commerce on this line of reasoning: Bridges are indispensable in such commerce and should be kept in repair, and the work of keeping them in repair "is so closely related to such commerce as to be in practice and legal contemplation a part of it." The court further said:

"The contention to the contrary proceeds upon the assumption that interstate commerce by railroads can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged. * * * Of course, we are not here concerned with the construction of the tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, *but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.*" We emphasize.

The court thought the work of taking bolts to the old bridge to be used in repairing it, though a minor task was essentially a part of the larger one. Those facts were held sufficient to sustain a finding that Pedersen was engaged in interstate commerce when injured. Three judges dissented, declaring the rule was that only employees engaged in the work of interstate transportation were within the act, and not those who kept up the instrumenalities whereby transportation was conducted. The words we have emphasized suggest that, although an employee helping with repair work upon an appliance used in interstate traffic is within the statute, one engaged in constructing an appliance that will be, but has not yet been, so used, is outside the scope of the act. An employee who was negligently hurt while mining coal in a colliery of a carrier, the coal to be used in interstate commerce, was held not within the act. Del., etc., Ry. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397. In Ill. Cent. R. Co. v. Behrens, a member of a switch crew was killed while assisting to move cars loaded with interstate freight in the city of New Orleans; but the crew also handled interstate freight. The court decided the deceased was not within the purview of the federal act when killed, though, upon the

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completion of his immediate task, he was expected to engage in another which would have been a part of interstate transportation under the statute; "for by its terms," said the court, "the true test is the nature of the work being done at the time of the injury." 233 U. S. 473, 478, 34 Sup. Ct. 646, 648 (58 L. Ed. 1051, Ann. Cas. 1914C, 163). In Shanks v. Railroad Co. the rulings of the United States Supreme Court up to the date of the decision were reviewed, and in the light of them plaintiff Shanks was held not to have been employed in interstate traffic while putting in a shaft to transmit power to machinery by which locomotives that drew both interstate and intrastate trains were repaired. The court said:

"Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation." 239 U. S. 556, 559, 36 Sup. Ct. 188, 190 (60 L. Ed. 436, L. R. A. 1916C, 797).

The like ruling was made where an employee lost his life in switching coal from a storage track to a coal shed, thence to be taken to bins and chutes and used, as occasion requires, on locomotives engaged in both kinds of commerce. The court said there was no close or direct relation to interstate transportation in taking coal to the chutes; that the employee was doing no more than putting the supply in a convenient place for use when it was required. Chicago, etc., Ry. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. A plaintiff had been injured while working in a tunnel which was in the process of construction by a carrier and to be part of its line for all trains. At the time of the accident it was incomplete and had never been used in interstate commerce. The opinion said it was certain under the recent decisions of the court, whatever doubt might have existed at the time the judgment below was rendered, that the plaintiff was not engaged in interstate commerce at the time he was hurt; consequently no cause of action was alleged under the federal act. Raymond v. Railroad, 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583. An employee hurt while employed on the construction of a bridge which had never been provided with rails nor used as a railroad was not doing interstate work when hurt in the course of his employment, although the employer intended the bridge to be a means of interstate traffic when it was completed. Bravis v. Railroad, 217 Fed. 234, 133 C. C. A. 228. The opinion said the bridge had not been used in interstate transportation and could not be used until finished; the fact that the intention was to use it at some future time did not make it a means of interstate commerce; the intention might be changed and the bridge not be used in that way at all. Answering the argument that the cutout, of which the bridge would constitute a part, was the correction of a defect in the defendant's road for interstate trains, the court said the argument was too remote and inconsequential. that the building of the cutout was a new construction work as much as would be the building of a new engine or car to take the place of an engine or car worn out in interstate commerce.

The national courts in construing the act in question, and in order to determine the status of an employee injured when employed upon an instrumentality which, as yet, has not been put into use in interstate business, but is intended to be, have drawn a distinction between construction work and repair work, and hold a workman engaged in repairs on an appliance employed in interstate traffic is within the provisions of the act; whereas one helping to make a new appliance to be thus used in the future is not so engaged. This is the rule formulated in an exhaustive annotation

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on the question, wherein many cases are cited in its support. Airline R. R. v. Horton, L. R. A. 1915C, note on foot of page 63. It is true, as said in a well-reasoned case, the distinction between repairs and construction work must not be too finely drawn; the particular matter the court then had under advisement being whether an employee killed in putting in new cross-arms on old poles to carry electric wires used in telegraphing and signaling was engaged in interstate commerce. The court held the work was in the nature of repairs, and therefore the case fell within the federal act. Ross v. Sheldon, 176 Iowa, 618, 154 N. W. 499. Neither the semaphore plaintiff was assisting to build nor the new depot was yet in use in any kind of commerce; for the old semaphore and depot had not been discarded. In fact the new ones were incomplete and the semaphore appears to have been far from completion. As suggested by Judge Sanborn, in the Bravis Case, neither had ever been used, and it is possible neither ever would be used, for some mishap might destroy them.

[4-6] The substantive rules of tort liability, as fixed by the adjudications in this state, differ materially from those which obtain in cases falling under the federal statute, particularly in regard to the doctrines of contributory negligence and assumption of the risk. Under the law of the state, contributory negligence on the part of an injured party is usually a defense; whereas under the federal statute it goes only to reduce damages; and assumption of the risk is given a wider scope by the national courts than is allowed in Missouri. The Supreme Court of the United States has held that in a case within the act of Congress, the federal law "is exclusive and supersedes state laws upon the subject." Chicago, etc., Ry. v. Wright, 239 U. S. 548, 551, 36 Sup. Ct. 185, 186 (60 L. Ed. 431), For these reasons it is plain that if a cause of action was not within the scope of the act, but was tried as though it were, it must be retried unless the rules of law, affecting liability and as established by the courts of the state, are the same as those which obtain under the federal statute, or are less favorable to the party against whom the verdict was given.

Plaintiff's counsel insists defendant should not be heard to say no recovery can be had under the federal act, because the court, at defendant's request, instructed against a verdict on the second count, which declared on a common-law liability. Maybe there would be force to this contention if defendant had insisted below the question of its liability was governed by the federal law; but the position taken by defendant was that there was no case under either law, and so it requested a charge that plaintiff was not entitled to recover on the first count, and another charge that he was not entitled to recover under the second count. The court refused the first request and gave the second—erroneously, we think.

[7-9] 3. Too much attention was given by both sides to the free pass Hughes had for himself and plaintiff. The defendant contends plaintiff was a trespasser in attempting to board a freight train, because the pass gave no right to ride on freight trains, and under the rules of the company it could not be used in that way. Neither plaintiff nor Hughes knew anything about the rules and plaintiff did not know anything about the terms of the pass, and, if Hughes' testimony is true, he did not; for he said similar passes always had been honored by the conductors of freight trains. In fact this very one was honored on the trip from Savannah to McAlester. There is no merit in the contention that plaintiff was attempting to trespass.

The free pass was admissible as an item of evidence to prove plaintiff was under Hughes' authority, inasmuch as it read in favor of Hughes and "1 man," and had been turned over to him. Being in Hughes' custody all the time, so that if separated from him plaintiff would have been deprived of its benefit, and maybe without means of any kind to take him to Savannah, it bore upon the issue of plaintiff's contributory negligence and assumption of the risk. It was treated in the second instruc-

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tion given for plaintiff in a manner to magnify, in the eyes of the jury, its importance, and confuse them regarding the issues to which it was relevant. Wherefore the instruction was a comment on one part of the evidence, and adapted to give the impression that the possession of Hughes made his order to plaintiff a negligent one. As we have said, the pass and his custody of it had a bearing on his authority to give the order, and on whether or not plaintiff was justified in obeying it, but did not have a bearing on the issue of the character of the order. That matter depended on the speed of the train, the experience of plaintiff, his physical condition, and the like facts. The jury's attention should not have been fixed on the pass to the degree it was in an instruction submitting the issues of whether the order of Hughes was negligently given and whether he ought to have known it was. Smith v. Woodmen of the World, 179 Mo. 119, 77 S. W. 862. Though this error by itself may not have been prejudicial to the extent of causing a reversal, it should be avoided on another trial.

If we are right in our judgment that the case does not come within the federal act, the issues of contributory negligence and assumption of the risk will be governed by the rules of law touching those subject that prevail in the state.

The judgment is reversed, and the cause remanded.

Blair, P. J., and Woodson, J., concur.

GRAVES, J. (dissenting). I dissent in this case because the plaintiff's evidence, in my judgment, fails to make a case either at common law or under the federal act. I agree with my learned Brother in his reasoning as to there being no showing of liability under the federal act; but I am of opinion that neither Hughes nor plaintiff was about the master's business at the time of the accident. The evidence as to their reason for the trip to McAlester is entirely too shadowy to form the basis of liability. The necessity of such a trip is not sufficiently shown. It is highly improbable that these two men could not have found food and lodging at or near their place of work, At least it is clear that plaintiff made no effort so to do and was in no position to show necessity for his trip.

Other suggestions might be made, but these will suffice. I therefore dissent.

WILLIS v. PILOT BUTTE MINING CO. et al. (No. 4542.)

(Supreme Court of Montana. May 8, 1920.)

190 Pacific Reporter 124

1. MASTER AND SERVANT— COMPENSATION ACT UNCONSTITUTIONAL IN ATTEMPTING TO CONFER ON SUPREME COURT JURISDICTION TO TRY CAUSE ANEW.

Workmen's Compensation Act, § 22(d), is unconstiutional in so far as attempting to confer on Supreme Court jurisdiction to try compensation case anew on appeal from district court as though matter was originally before it.

(For other cases, see Master and Servant, Dec. Dig. § 418[1].)

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2. MASTER AND SERVANT—COMPENSATION ACT PROVISION THAT TRIAL IN DISTRICT COURT SHOULD BE DE NOVO CONSTITUTIONAL.

District courts being courts of original jurisdiction, it was within constitutional power of Legislature to provide in Workmen's Compensation Act, § 22(b), that trial of a compensation case in district court should be de novo, but power given court is that of review rather than a trial anew, particularly in view of section 20(h).

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

Appeal from District Court, Silver Bow County; Joseph R. Jackson, Judge.

Proceedings under the Workmen's Compensation Act by Martha Willis for compensation for the death of her husband, W. A. Willis, the employee, opposed by the Pilot Butte Mining Company, the employer, and the Ætna Life Insurance Company, the insurer. Compensation was awarded by the Industrial Accident Board, the award affirmed by the district court, and from its judgment the employer and insurer appeal. Affirmed.

Frank & Gaines, of Butte, for Appellants.
H. A. Tyvand, of Butte, for respondent.

MATTHEWS, J. On March 20, 1916, W. A. Willis, while employed as station tender for appellant mining company, was shot by Nathan Brooks, mine foreman for said company, and thereafter died. Willis was subject to the provisions of the Workmen's Compensation Act, and respondent, for herself and her minor child, filed with the Industrial Accident Board her proof of injury and death, and application for compensation. Two separate hearings were had before the board, and on August 30, 1919, award was made in accordance with the application. The company and its insurance carrier appealed to the district court of Silver Bow county, and after a hearing, the court found in favor of respondent and entered judgment in accordance with the award made by the board. The matter is before us on an appeal from the judgment of the district court.

It was in the district court, and is here, conceded that the death of Willis resulted from an accident or forfuitous event arising in the course of his employment, and the only question presented is: Did the injuries resulting in the death of Willis arise "out of" his employment.

We are asked to try the case anew and, disregarding the findings of the board and of the trial court, to determine the question so presented, as an original proceeding, on the record made in the district court and before the board, as provided in section 22(d) of the Compensation Act (chapter 96, Laws of 1915), which section reads as follows:

"Either the board, or the appellant (applicant), or any adversary party, if there be one, may appeal to the Supreme Court. * * * * When any such cause is so appealed it * * * * shall be tried anew by said Supreme Court upon the record made in said district court and before said board. * * *"

It is urged that this court stands in the same position as a district court on an appeal from a justice's court and that the trial here is a trial de novo. But this cannot be. Section 2, art. 8, of our Constitution, provides:

"The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only. * * *"

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And "shall have power * * * to issue and to hear and determine * * * such * * * original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction." Section 3, art. 8.

It "shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law" (section 2, art. 8), and shall have power to issue, hear, and determine the six original writs named in section 3 of article 8.

"The provisions of this Constitution are mandatory and prohibitory, unless, by express words they are declared to be otherwise." Section 29, art. 3, Constitution of Montana.

In re Weston, 28 Mont. 207, 72 Pac. 512, this court said:

" 'The source of all power vested in the Supreme Court is the Constitution of the state, and in it must be found the measure of jurisdiction.' * * * The power to issue, hear, and determine the six original writs enumerated above marks the limit of the original jurisdiction of this court."

[1] It will be readily seen, therefore, that the Legislature was without authority to grant to this court jurisdiction to try the cause "anew" as though the matter was originally before us, and, to the extent that section 22(d) of the Compensation Act attempts to confer such jurisdiction, it is unconstitutional. In the language of the opinion in the Weston Case:

"The full measure of the relief which may be granted is a review of the decision of the lower court and a judgment of this court affirming, modifying, or reversing the decision. Further than this we cannot go."

Section 22(b) of the act provides that, on appeal to the district court from the judgment of the board "the trial of the matter shall be de nova (de novo)," but further provides that—

"Upon such trial the court shall determine whether or not the board regularly pursued its authority, and whether or not the findings of the board ought to be sustained, and whether or not such findings are reasonable under all the circumstances of the case," and provides further, "The court may, upon the hearing, for good cause shown, permit additional evidence to be introduced, but, in the absence of such permission from the court, the cause shall be heard, on the record of the board as certified to the court by it," and (c) "If the court shall find from such trial, as aforesaid, that the findings and conclusions of the board are not in accordance with either the facts or the law, or that they ought to be other or different than those made by the board, or that any finding and conclusion or any order, rule or requirement of the board is unreasonable, the court shall set aside such finding, conclusion, order, judgment, decree, rule, or requirement of said board, or shall modify or change the same as law and justice shall require, and the court shall also make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises."

[2] As district courts are courts of original jurisdiction, it was within the constitutional power of the Legislature to provide that the trial in the district court shall be de novo, as indicated; but the power given the district court is that of review, rather than a trial anew. That this is true is emphasized by the provisions of section 20(h) that—

"No orders or decisions of the board shall be subject to collateral attack, and may be reviewed or modified only in the manner provided herein."

[3] The district court of Silver Bow county followed the procedure outlined in the act, and made findings "that the said Industrial Accident

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Board as far as it proceeded regularly, pursued its authority; that the findings of the said Industrial Accident Board ought to be sustained and that its findings are reasonable under all the circumstances of the case; that the accident to W. A. Willis, which resulted in his death, arose out of his employment for the Pilot Butte Mining Company, and therefore compensation should be awarded to the widow of W. A. Willis, Martha Willis, as per the provisions of the Workman's Compensation Act," and rendered judgment accordingly, without making further findings in the premises. Our duty, then, is but to determine whether the evidence before the board clearly preponderates against its findings, as adopted by the court; if not, we must affrm the judgment. The rule that the Supreme Court will not reverse the findings of the district court, except where the evidence clearly proponderates against them, is so well settled in this jurisdiction as to hardly require repetition

Willis was station tender in appellant company's mine; Brooks, the night foreman with authority over Willis. Just prior to the shooting, Brooks visited Willis on the 2,600-foot level and communicated to him an order of the day foreman that he (Willis) should remain on shift until relieved. According to Brooks, an altercation arose concerning his action in discharging one Shannon, Willis accusing him of trying to "frame up on" him as, he contended, Brooks had done on Shannon. Brooks then ordered Willis to signal for the cage to be raised to the next level that he might make an inspection there. Willis gave some signal and entered the cage with Brooks, which he had a right to do. Whether Willis gave the correct signal which was misunderstood by the engineer, or whether he gave the signal to hoist to the surface, could not be ascertained. The cage continued to the surface, and, on leaving it, the two men immediately met in personal encounter. Who was the aggressor is not entirely clear; nor is the evidence satisfactory as to the cause of the trouble. According to Brooks' version of the affray, while he gives no satisfactory explanation for the act, "Willis attempted to grab me and get my lamp, which he finally did,' that he then broke away and ran for the office. On the other hand Willis being advised that he could not live, made the following statement:

"Since I am going to die, I want you to know just what happened. We were coming upon the cage together and, as we got off the cage on the surface Brooks hit me on the jaw with his heavy carbide lamp. I clinched him and got the lamp, but he broke away and I after him through the side door of the boiler room, through into the engine room. When I reached the front door of the engine room I could not see him, and thought to myself I'd 'bunch it' (meaning quit). So I started for the dry, and, just as I turned off the trail to leave his lamp on the step of the office, Brooks opened the door with a gun in his hand and aimed at me. I was startled at the sight of the gun, but did not think he was going to 'blast' as he held the gun on me for fully a minute before he shot me. I backed towards the dry, and he followed and shot me again and was going to shoot the third time, when I said, 'Well, I guess you got me,' and I fell." Asked the question: "Was there any other trouble?" Willis replied: "No trouble at all; he killed me for nothing, that's all."

Two witnesses were present but saw little of the affray, and their testimony might easily corroborate the theory that either was the aggressor. After the shooting, Willis had a cut on his jaw, while Brooks had no mark on either his face or body. It is significant that, while Brooks ran to the office, Willis followed at a walk. This fact would seem to support his statement that he was but going to the dry to change his clothes; had he been intent on continuing the combat, it would seem that he would have sought to overtake Brooks on the way to the office.

The second hearing was held before the board some two years after

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the death of Willis and after Brooks had stood trial for the killing; while the first hearing was had before the trial and while Brooks would wish to make the circumstances as favorable to himself as possible. On this second hearing, Brooks still exhibited considerable heat on account of the fact that he was taken to the surface when he wanted to go to the next level, as shown by the following excerpt from his testimony:

"Q. Do you remember when you first saw him that morning? A. On the 2,600 when I went to make my inspection. Q. And then you both came up on the cage together?" Without further question or suggestion, Brooks answered: "We both came up on the cage together. I had an inspection to make, and he took me over. He had no business going up above. His business was to hoist rock, and he took me on top. I did not want to go on top."

It might be reasonably inferred, taking the statements of the two men together, that Brooks was angered by the action of Willis in taking him "to the top" and thus disobeying his directions, and that the blow struck with the lamp was in the nature of punishment for that act of carelessness or disobedience, and that what took place thereafter was all a part of the same transaction, and the shooting was a sequence and a part of this quarrel over the work. This was the theory of the board when it found that "the possibility of quarrels was an existing fact, as evidenced by the act of the shift boss hitting him on the head with a heavy carbide lamp, apparently because of a mistake in taking the cage to the sunface when it should have stopped at the 2,400-foot level," which finding is declared by the district court to be "reasonable."

The board also found that—

"The conversation about Shannon would naturally be the reply to the giving of this order (to remain on shift until relieved), as there is testimony to show that the men on the shift were more or less irritated at the discharging of some of their fellow employees, including Shannon, by Mr. Brooks. Some significance is attached to this order by the exclamation of the day foreman, Mr. Little, at the time of the shooting. He seemed to immediately conclude that his order was the cause of it." "There is not a particle of evidence to show that there was any personal animosity between Mr. Brooks and Mr. Willis. In fact, all the evidence shows that Mr. Willis was a peaceably inclinded man. * * * The irresistible inference is that this fatal quarrel arose from the work or employment in which Willis was engaged."

The difficulty in this and kindred cases arises from the fact that we must determine a question of fact rather than a proposition of law. No clear-cut rule is, or can be, laid down; each case must be decided on its own facts and attendant circumstances and forms no precedent for future decisions.

"Previous decisions are illustrations of the way in which judges look at cases, and in that sense are useful and suggestive; but I think we ought to beware of allowing tests or guides which have been suggested by the courts in one set of circumstances, or in one class of cases, to be applied to other surroundings, and thus by degrees to substitute themselves for the words of the Act itself." Per Lord Loveburn, L. C., Blair v. Chilton, 8 B. W. C. C. 607, 113 L. T. Rep. (n. s.) 514, aff. B. W. C. C. 324, 30 T. L. Rep. 623; foot-note 76, p. 73, Workman's Compensation Act, a Corpus Juris Treatise.

And the same jurist, in Kitchenham v. Steamship Johannesburg, A C. 417, 4 B. W. C. C. 311, said:

"We have to decide each case on the facts. Argument by analogy is valueless. I am getting afraid to say anything more by way of judgment

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than that the appeal should be allowed or dismissed, because what one says in one case is used as an argument why one should decide a particular way in another case."

However, certain general rules will aid in the determination of the question.

In the case of Wiggins v. Industrial Accident Board, 54 Mont. 335, 170 Pac. 9, L. R. A. 1918F, 932, Ann. Cas. 1918E, 1164, this court laid down a general rule as to what accidents come within the provisions of the act, as follows:

"Without attempting to formulate a rule which will include every injury within the meaning of this phrase, it is sufficient for the purposes of this appeal to say that if, by reason of the nature of the employment itself or the particular conditions under which the employment is pursued, the workman is exposed to a hazard peculiar to the employment under the circumstances, and injury results by reason of such exposure, then it may be said fairly that the injury arises out of the employment, or, stated in different terms, the workman must have been exposed by his employment to more than the normal risk to which the people of the community generally are subject, in order that his injury can be said to arise out of his employment," "without reference to * * * fault and altogether irrespective of whether, under existing laws, actions for damages would lie." Lewis and Clark County v. Industrial Accident Board, 52 Mont. 6, 155, Pac. 268, L. R. A. 1916D, 628.

In the case of State ex rel. School District v. District Court, 140 Minn. 470, 168 N. W. 555, the Supreme Court of Minnesota said:

"That under some circumstances an injury from an assault is one caused by accident arising out of the employment is without question; and it is as much without question that under other circumstances it is not. When the nature of the employment is such as naturally to invite assault, or when the employee is exposed to an assault by the character of his work, as when he is protecting or in charge of his employer's property, and the assault naturally results because of the employment and not because of something unconnected with it, so that it is a hazard or special risk of the work, the cases say that it arises out of the employment." (The court then summarizes the cases so holding.) "When the assault is unconnected with the employment, is personal to the assailant and the one assaulted, is not because the relation of employer and employee exists, and the employment is not the cause, though it may be the occasion, of the wrongful act, and may give a convenient opportunity for its execution, the cases say that the intentional injury does not arise out of the employment [giving illustrative cases]."

Bradbury, in his work on Workmen's Compensation (chapter 8, art. F, "Assaults"), digests many cases of assault, clearly demonstrating that the courts are in practical accord that (1) personal altercations in no way connected with the employee's duties do not give rise to accident arising out of the employment, but that (2) where the employee is performing work he was employed to perform, and is assaulted because of the work, or of some incident in connection with the work, or his manner of doing it, and receives an injury, it is an accident arising out of his employment.

Section 24(a) of our Compensation Act provides:

"Whenever this act or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court."

And in the case of Shea v. North-Butte Mining Co., 55 Mont. 522, 179 Pac. 499, it is stated that—

"The theory of such legislation is that loss occasioned by reason of injury to the employee shall not be borne by the employee alone—as it

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was under the common-law system—but directly by the industry itself and indirectly by the public, just as is the deterioration of the buildings, machinery and other appliances necessary to enable the employer to carry on the particular industry."

Among the illustrative cases cited by Bradbury, at pages 589, 590, we find the following:

"A newspaper reporter was directed by his employer to get the first copy of the newspaper off the press to see if the makeup was correct He was forcibly resisted by the pressman, the reporter repeatedly and properly attempting to do as he was instructed. When about to report the matter to his superior, the reporter was unexpectedly and without other provocation assaulted. It was held that this was an accidental injury arising out of the employment. (Brown v. Berkely Daily Gazette, 2 Cal. Ind. Acc. Com. 32 [841].)

"Two workmen had an altercation in which the one who finally committed the assault was the aggressor and the employer observing it, told them they would both be discharged unless they desisted. A little later the workman who had originally been the aggressor approached from behind the other workman and struck him on the head with such force that he afterwards died. It was held that the accident arose out of the employment. (McNiel v. Mountain Ice Co., 38 N. J. Law J. 109, 11 N. C. C. A. 238.)

"A driver told a fellow workman in a stable that he was using too much water on a horse, when the workman intentionally sprinkled some water on the driver, who was the claimant. The claimant a moment later spoke to the fellow workman, who slapped the claimant on the shoulder, and as the claimant turned around a finger of the fellow workman struck the claimant in the eye causing injuries by which he lost the sight of the eye. It was held that there was sufficient evidence to sustain a finding that the injury arose out of the employment. (Heintz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, [L. R. A. 1917A, 344].)"

Numerous other cases are noted, but we will not cumber this opinion further by their quotation.

In its final order the board says:

"It must be remembered that Mr. Brooks was night foreman, having charge of the property and employees of the Pilot Butte mine, at the time of the accident, and that he stands in the position of the employer. What he knew and did was really what the employer knew and did. In support of this view is the case of Kinsel v. North Butte Mining Co., 44 Mont. 445, 120 Pac. 797. Part of the opinion in point on this question is as follows: 'The evident purpose was to show that Wells was a vice principal. He was engaged in performing a primary absolute and unassignable duty of the master. * * * This fact in itself takes him out of the category of fellow servants and makes him a vice principal. * * * His negligent act was that of the master itself.'"

There seems to be some authority for an additional exception to the rule that ordinarily assault cases do not form the basis for an award when there is a difference in rank between the employee assaulted and the assaulting employee. Thus in the case of Metropolitan Redwood Co. v. Industrial Accident Board (Cal. App.) 182 Pac. 315, after stating the general rule, the court continues:

"A second exception is also noted in the cases cited which arises * * * where the injured employee was the superior in rank to the one causing his injuries, the assault arising out of an attempted exercise of discipline on the part of the superior employee."

It would seem that, if such a case constitutes an exception to the rule,

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the converse would also be true, and an exception would exist where, under like conditions, injury resulted to the employee sought to be disciplined.

A case similar to that just noted is Polar Ice Co. v. Mulray (Ind. App.) 119 N. E. 149, where the facts were that Mulray was a bookkeeper charged with the duty of keeping a record of outgoing merchandise and the returns made by the drivers, and collecting for shortage; a driver, being angered over an attempted collection, caused trouble in the office, when Mulray drove him off with a revolver, shooting several times over his head; the driver returned armed and killed Mulray. The court in closing its opinion said:

"While it may be said that the inference that the unfortunate accident in the case was the result of a risk reasonably incident to Mulray's employment, and therefore arose out of his employment, it is not the only inference which might be drawn from the evidence, yet it is a very reasonable one, and since the Industrial Board has so concluded, we are required to uphold the award."

[4] Here the inference might be drawn that the trouble between Willis and Brooks arose on account of a feeling of enmity between Willis toward Brooks by reason of the discharge of Shannon, or a feeling that Brooks was attempting to seek excuse for his discharge; or it might be inferred, as it was by the board, that Brooks was the aggressor in the affray because of his anger toward Willis for carrying him to the surface when he did not want to go above the 2,400-foot level, and that what took place thereafter was all a part of the same transaction, resulting finally in the death of Willis, as a result of, and arising out of, his employment. Assuming that such were the facts, under the authorities and sound reasoning, his widow should be awarded compensation for herself and child; and the board having so found, which finding was declared by the district court, on review, to be reasonable, we are of the opinion that the judgment of the district court should be affirmed.

Affirmed.

Holloway, Hurly, and Cooper, JJ., concur.

Brantly, C. J., being absent, takes no part in the foregoing decision.

FARMERS' GRAIN & SUPPLY CO. OF MINDEN v. BLANCHARD. (No. 21467.)

(Supreme Court of Nebraska. June 7, 1920.)

178 Northwestern Reporter, 257.

(Syllabus by the Court.)

2. MASTER AND SERVANT—"RECKLESS INDIFFERENCE TO SAFETY," WITHIN COMPENSATION ACT DEFINED.

"Reckless indifference to safety" as used in section 3693, Rev. St. 1913 (Workmen's Compensation Act), means more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

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Appeal from District Court, Kearney County; Dilworth, Judge.

From an award of compensation by the compensation commissioner to Jennie M. Blanchard for the death of her husband while employed by the Farmers' Grain & Supply Company of Minden, it appealed to the district court. From its judgment setting the award aside and dismissing the claim, claimant appeals. Reversed and remanded to affirm the award of the compensation commissioner.

Bernard McNeny and Howard S. Foe, both of Red Cloud, for appellant.

Lewis C. Paulson, of Minden, for appellee.

LETTON, J. The appellant was awarded compensation by the compensation commissioner for the death of her husband while employed by the appellee. On appeal to the district court the award was set aside and judgment of dismissal rendered. Claimant appeals.

The husband of the appellant, on June 30, was manager of the grain elevator of appellee at Minden. The bookkeeper, whose duty it was to attend to the correspondence and make out reports, was absent from the town for a few days. A report had been called for by the United States Grain Corporation, which, according to a letter accompanying the same, was due in Omaha the next day. The post office in Minden was about six blocks from the elevator, and the elevator was about two blocks from the railroad station. The deceased procured assistance in making out the report from the manager of a neary elevator, placed it in an envelope, and, when the accident happened, was proceeding to the railroad station in order to post the letter upon the mail car of a train coming from the west. There are three parallel tracks at Minden, the elevator track, the passing track, and the main track. The evidence shows that deceased crossed the elevator and passing tracks. He looked west, and presumably saw the train approaching. An eyewitness testifies that he then proceeded between the main and passing tracks in the direction of the station at a rapid walk or dog trot, was struck by the engine of the train, and thrown about 20 feet. The train, according to this witness, was running faster than usual. The space between the tracks was about 10 or 12 feet, and, so far as this witness could see, deceased had not veered toward the main track when he was struck. The fireman on the train, however, testifies that he saw the deceased cross the tracks, and saw him running between the main line and the passing track; that at one point he took a very slight angle toward the main track, and had reached about the end of the tie when he was struck, presumably by the pilot beam of the engine.

The district court made a general finding that appellant was not entitled to compensation, but from the briefs it would appear that the court found that death was caused by an accident which did not arise out of and in the course of Blanchard's employment, or that the accident was caused by his wilful negligence. The preparation of the report to the grain corporation was one of the duties which devolved upon Blanchard when the bookkeeper was absent, and the fact that the post office was six blocks distant from the elevator while the station was only two blocks away, and that he was alone in the elevator, showed that he desired to spend as little time as possible away from his main post of duty. We are satisfied that the accident arose out of and in the course of his employment. The fact that the bookkeeper always mailed letters at the post office when he attended to the correspondence is not material.

[1, 2] The other question presented is whether the accident was caused by the willful negligence of the deceased. Willful negligence is defined in the statute as follows:

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"For the purpose of this act willful negligence shall consist of (1) deliberate act, or (2) such conduct as evidences reckless indifference to safety, or (3) intoxication at the time of injury, such intoxication being without the consent or knowledge or acquiescence of the employer or the employer's agent." Section 3693, Rev. St. 1913, as amended by chapter 85, Laws 1917.

The deceased was 66 years of age. He had been moving rapidly, one witness saying it was a fast walk, or trot; another called it a run. He suddenly swerved toward the main track at or near a switch. Whether he made a misstep, whether his progress was interfered with by means of the switch, or whether from the exertion or from some other cause he became dizzy and swerved toward the train it is impossible to determine. There is nothing in the record which would indicate that his domestic relations were unpleasant, that he was worried or depressed on account of other trouble, or that would in any wise indicate that he contemplated self-destruction. The presumption of law is against such a conclusion. "When violent death is shown, the presumption arises that it was not self-inflicted. As between accident and suicide, the law supposes accident until the contrary is shown." State ex rel. Oliver Iron Mining Co. v. District Court of St. Louis County, 138 Minn. 138, 164 N. W. 582; Wishcaless v. Hammond, Standish & Co., 201 Mich. 192, 166 N. W. 993.

Does the testimony show "such conduct as evidences reckless indifference to safety?" There were 10 or 12 feet of space between the tracks, which to an ordinary mind would indicate there was plenty of room for a person to travel safely in the same direction as the train. While there is no doubt that it was careless to attempt to move rapidly, side by side with a rapidly moving train in the narrow space between the tracks, we think it does not necessarily show "reckless indifference to safety." In Webster's Dictionary "reckless" is defined as "rashly negligent; utterly careless or heedless." The word "reckless" has been defined by courts many times. The definitions do not always agree, some saying that a reckless act is the equivalent of a willful one, while others say the word does not imply willful, but merely heedless, careless, rash, indifferent to consequences. "Reckless indifference to safety" as used in the statute means more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in degree, a willingness to take a chance. We may well conclude that deceased believed there was ample space between the tracks in which he might move with safety. An error of judgment of this kind would not evidence recklessness, and while a prudent and careful man might have stepped away, the true test is not what such a man would have done under the circumstances, but whether the act was in itself more than merely careless, and was within the statutory definition of willful negligence. Since the divergence from the middle of the space between the tracks may have resulted from several different causes, we think the evidence does not sustain a conclusion that the accident was the result of "willful negligence" as defined in the statute The judgment of the district court is reversed, and the cause remanded, with directions to affirm the award of the compensation commissioner.

Reversed and remanded, with directions.

Aldrich, J., not sitting.

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MURRAY v. UNION RY. CO. OF NEW YORK CITY.

(Court of Appeals of New York. June 1, 1920.)

127 Northeastern Reporter 907.

1. MASTER AND SERVANT—"SPECIAL EMPLOYEE" DEFINED.

An employee may be in the general employment of one master and the special employment of another, but does not become a "special employee" of the latter, unless he consents thereto, with the understanding that he is submitting himself to control of a new master.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT — DETECTIVE BUREAU'S EMPLOYEE, GUARDING CARS, HELD NOT RAILWAY'S "SPECIAL EMPLOYEE," WITHIN COMPENSATION LAW.

Where a detective bureau had a contract with a railroad during strike to furnish guards to protect passengers on cars, an employee of the bureau, injured in collision while serving as guard, without knowledge as to whether he was in the employ of the railroad or merely an employee of the bureau, was not a special employee of the railroad, within Workmen's Compensation Law, so as to prevent him from resorting to a common-law action against the railroad for negligence.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Supreme Court, Appellate Division, Second Department.

Action by George J. Murray against the Union Railway Company of New York City. From a judgment of the Appellate Division (183 App. Div. 209, 170 N. Y. Supp. 601), reversing a judgment of the Trial Term, entered on a verdict for plaintiff, and dismissing complaint, plaintiff appeals. Judgment of Appellate Division reversed and judgment of Trial Term affirmed.

Henry M. Dater, of Brooklyn, for appellant.

Alfred T. Davison, of New York City, for respondent.

CARDOZO, J. In July, 1916, there was a strike of motormen and conductors on the street railroad operated by the defendant in the city of New York. The Washington Detective Bureau undertook to furnish other motormen and conductors, and also guards or watchmen to protect the passengers and cars from violence. One of the guards was the plaintiff. He was injured in a collision as the result of the defendant's negligence. The question is whether his relation to the defendant at the time of the collision was that of an employee to an employer, either general or special. Matter of De Noyer v. Cavanaugh, 221 N. Y. 273, 116 N. E. 992. Matter of Schweitzer v. Thompson & Norris Co., 127 N. E. 904 (decided June 1, 1920). If it was, the remedy under the Workmen's Compensation Law (Consol. Laws, c. 67), is exclusive of every other. If it was not, the common-law remedy for negligence survives. The plaintiff had a verdict at Trial Term. The Appellate Division reversed and dismissed the complaint.

Beyond doubt, the detective bureau was the plaintiff's general employer. Matter of De Noyer v. Cavanaugh, supra. It hired him and paid him, and had the power to discharge him. He was not told by the men who hired him of the nature of the arrangement between the bureau and the railroad. All that he was told was that they were sending him to guard cars, just as they had sent him on other occasions to guard factories

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or offices. On his arrival at the barn, he found one of the employees of the bureau giving orders to the watchmen and assigning them to duty. Under orders thus given, he went upon a car, and, while guarding it, was injured.

[1] We see nothing in these facts which was equivalent as matter of law to the acceptance of a change of masters. We do not doubt that the same man may be in the general employment of one master and the special employmnt of another. Matter of Schweitzer v. Thompson & Norris Co., supra; McNamara v. Leipzig, 227 N. Y. 291, 125 N. E. 244. But employment, like any other contract, presupposes understanding. The new relation cannot be thrust upon the servant without knowledge or consent. McNamara v. Leipzig, supra; Standard Oil Co. v. Anderson, 212 U. S. 215, 221, 29 Sup. Ct. 252, 53 L. Ed. 480; Hull v. Phila. & Reading Co., 252 U. S. ——, 40 Sup. Ct. 358, 64 L. Ed. —— (April 19, 1920). He must understand that he is submitting himself to the control of a new master. We are not concerned at the moment with cases in which the rights of third persons are involved. We speak of cases where the parties to the disputed relation are the parties to the controversy. Understanding may be inferred from circumstances, but understanding there must be Common-law rights and remedies are not lost by stumbling unawares into a new contractual relation. There can be no unwitting transfer from one service to another.

[2] If understanding of a new relation may be imputed to the plaintiff, it is at most an inference of fact to be drawn by a jury. Nothing in the situation as he knew it made the inference inevitable. He is not chargeable with the legal consequences of the arrangements as known and approved. Knowledge and approval may be inferred where the servant, continuing in the service, takes his orders from some one other than the hirer or the hirer's representative. Here the hirer's representative was, or seemed to be, in continuous authority. A detective agency may undertake to guard the property of another with its own men and in its own way. Standard Oil Co. v. Anderson, 212 U. S. 215, 221, 29 Sup. Ct. 252, 53 L. Ed. 480; McNamara v. Leipzig, supra; Matter of Schweitzer v. Thompson & Norris Co,, supra. It may undertake, on the other hand, to furnish another with men, so that he may guard his property for himself. Standard Oil Co. v. Anderson, and McNamara v. Leipzig, supra. In the one undertaking, the relation of employment is unchanged. In the other, a new relation arises when the transfer is effected and the contract is fulfilled. Whether this undertaking fell in the one class or in the other, the plaintiff did not know. He remained, in default of knowledge, the servant of the hirer.

The judgment of the Appellate Division should be reversed, and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.,

Hiscock, C. J., and Chase, Collin, Pound, Crane, and Andrews, JJ., concur.

Judgment accordingly.

SCHWEITZER v. THOMPSON & NORRIS CO. OF NEW JERSEY ET AL.

(Court of Appeals of New York. June 1, 1920.)

127 Northeastern Reporter 904.

1. MASTER AND SERVANT—SPECIAL EMPLOYMENT.

One may be in general service of another, and nevertheless with respect to particular work of another may be transferred, with his con-

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sent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of a new relation.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT—COMPENSATION MAY BE AWARDED AGAINST SPECIAL EMPLOYER.

Where a servant has been transferred by the general employer to another under such circumstances as to create that other a special employer under rules of common law, an award, under Workmen's Compensation Law, § 10, for injuries may be made against the general employer or the special employer in whose work the employee was injured.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

3. MASTER AND SERVANT—TRUCK OWNER'S CHAUFFEUR, CLAIMING COMPENSATION, HELD NOT A "SPECIAL EMPLOYEE" OF OWNER OF GOODS CARRIED.

Where proprietor of trucking business contracted to do trucking for a manufacturing company at a stipulated price per day for each truck furnished, with a chauffeur, and the only control which the company had over the chauffeurs was to tell them where to go and what to carry, a chauffeur, injured while assisting in loading a truck with the company's goods, was not its special employee, so as to entitle him to an award against it, under Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Chase, Hogan, and Elkus, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Act by Anna Schweitzer for compensation for death of Henry Wichser, opposed by the Thompson & Norris Company of New Jersey, employer, and the Ætna Life Insurance Company, insurer. From an order of the Appellate Division (180 N. Y. Supp. 952), affirming an award of the State Industrial Commission to claimant, the employee and insurer appeal. Reversed, and claim dismissed.

James R. Henney, of New York City (William H. Foster, of Syracuse, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

CRANE, J. [1] It is well settled that one may be in the general service of another, and nevertheless with respect to particular work may be transferred with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation. Standard Oil Co. v. Anderson, 212 U. S. 215, 220, 29 Sup. Ct. 252, 53 L. Ed. 480. Difficulty frequently arises in determining when this transfer of relationship takes place. The rule was stated in this court in Hartell v. Simonson & Son Co., 218 N. Y. 345, 349, 113 N. E. 255, 256, to be the following:

"A servant in the general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes, for the time being, the servant of the borrower, who is liable for his negligence. But if the general employer enters into a contract to do the work of another, as an independent contractor, his servants do not become the servants of the person with whom he thus contracts, and the latter is not liable for their negligence."

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The cases of Kellogg v. Church Charity Foundation of Long Island, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883, and Schmedes v. Deffaa, 153 App. Div. 819, 138 N. Y. Supp. 931, and 214 N. Y. 675, 108 N. E. 1107, were cited as illustrations of the distinction.

Recognizing this temporary shifting of the relationship of master and servant, the question has arisen in this case whether the Workmen's Compensation Law (Consol. Laws, c. 67) has extended liability beyond either general or special employment; that is, will one engaged in a hazardous employment be liable to the servant of another, who happens to be doing work for him under such circumstances as not to make him a special employer under existing law?

It was intimated in Matter of Dale v. Saunders Bros., 171 App. Div. 528, 157 N. Y. Supp. 1062, that such might be the law. This case was affirmed by this court in 218 N. Y. 59, 112 N. E. 571, Ann. Cas. 1918B, 703. The facts briefly were that one Dale was employed as a wagon driver by Saunders Bros., who sent him to cart dirt from a sand bank for one Walsh. While Dale was at work with his team and wagon, the sand bank fell upon him and killed him. The claim for compensation was made against the general employers, Saunders Bros. It was allowed by the Appellate Division and by this court. In affirming the Dale Case we did not mean to adopt all that was said in the opinion below. It was there stated:

"It is not a question of hiring, or of master and servant, but of using and putting the man in the hazardous employment which the act has in view. * * * When it appears that a person in his service or who he is employing or using therein receives an injury, compensation follows." 171 App. Div. 531, 157 N. Y. Supp. 1064.

A person may be using another in his work without making him his servant. A man in the trucking business may contract to do all the hauling and delivering for a manufacturer. He becomes an independent contractor for the trucking work. The manufacturer would be using the drivers or chauffeurs in his business but they would not be his employees.

The basis of the Workmen's Compensation Law is the relationship of master and servant. Section 10 reads:

"Every employer * * * shall pay * * * compensation * * * for the disability or death of his employee * * * arising out of and in the course of his employment. * * *"

The employment and the hazardous occupation go together, they cannot be separated. The general employer or the special employer, one or both, may be liable, but there must be employment known and recognized by the common law; the special employer becomes such because at common law the servant of another becomes his servant pro hac vice. In this respect the Workmen's Compensation Law has not changed the law. It was said in our opinion in the Dale Case:

"The doctrine of respondeat superior has no application here, nor are the rules of employers' liability for negligence controlling."

But this was said in answer to the claim that the responsibility was all Walsh's, as he was a special employer. In the case of Matter of De Noyer v. Cavanaugh, 221 N. Y. 273, 275, 116 N. E. 992, the claim was again made against the general employer. There one Joseph E. De Noyer was a truck driver for D. B. Cavanaugh. Cavanaugh made an arrangement with the Crown Oil Company to furnish a horse and driver to be used in connection with a tank wagon owned by the company for the delivery of oil. While De Noyer was making deliveries he was injured, and an award for compensation was made against Cavanaugh, his general employer. In sustaining this award we said of Dale v. Saunders

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that we had held in that case that the general employer who carried on a hazardous employment is liable under the Workmen's Compensation Law for injuries sustained or death incurred by his employee, arising out of and in the course of his employment, although at the time he was working under the direction of a special employer. It was further stated by Judge Pound in the opinion:

"It does not follow that by the application of this rule the special employer is not to be held in any case. The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself. If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being his employees. Comerford's Case, 224 Mass. 571, 573. Thus at one and the same time they are generally the employees of the general employer and specially the employees of the special employer. As they may under the common law of master and servant look to the former for their wages and to the latter for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other or to both for compensation for injuries due to occupational hazards (Workmen's Compensation [Con. sol. Laws, c. 67], § 3, subds. 3, 4), and the Industrial Commission may make such an award as the facts in the particular case may justify."

[2] Where, therefore, the circumstances show that a servant has been transferred by his general employer to another under such circumstances as to create that other a special employer under the rules of the common law as heretofore decided, the Workmen's Compensation Commission may make an award for injuries received against the general employer or against the special employer in whose work the employee was injured. This is not the same as saying that one using the servant of another is liable simply because the servanti is performing his work when the relationship of special employer and employee would not exist at common law. The case cited (Comerford's Case, supra) indicates that such was our holding. In that case a contractor had agreed to construct a small brick garage, and applied to a master teamster to take some concrete window sills, wheelbarrows, picks, and shovels out to the work on the following morning. An employee of the teamster having been sent with the team, was injured by one of the sills falling upon him, and it was held that the employer of the master teamster was not in the employ of the contractor at the time of his injury. A statute in Massachusetts, however, reads as follows (St. 1911, c. 751, pt. 3, § 17):

"If a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work, or if such a contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employees immediately employed by the subscriber be liable to pay compensation under this act to those employees, the association shall pay to such employees any compensation which would be payable to them under this act if the independent or subcontractors were subscribers."

Under this statute is was said by the court that the Industrial Accident Board could determine whether the work performed by Comerford, the driver, was part of the business of McDonald & Joslin Company, the contractors, or was merely ancillary and incidental thereto. We have no such statute in this state, and unless the employee hired out to another becomes his employee under the ad hoc doctrine (Cannon v. Fargo, 222 N. Y. 321, 118 N. E. 796), the Workmen's Compensation Law only applies to the general employer.

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It was said that the case of Matter of Nolan v. Cranford Co., 4 State Dept. Rep. 337, affirmed 171 App. Div. 959, 155 N. Y. Supp. 1128, and 219 N. Y. 581, 114 N. E. 1074, is opposed to this ruling. No opinions were written in the appellate courts. Findings in that case, made by the Industrial Commission, established that Nolan, the employee of one Kane, was at all times under the direction and control during the working hours of Cranford & Co., the special employer. This constituted, within the rules first stated in this opinion, a special employer at common law. Understanding this to be the rule, we shall now attempt to apply it to the facts of this case, to determine whether or not the award here allowed against the alleged special employer was proper.

Thompson & Norris Company of New Jersey had a factory for manufacturing paper goods at 212 Concord street, Brooklyn. This company had an agreement with Herman Gier, doing business under the name of Gier Auto Trucking Company, whereby Gier was to do the trucking for the Thompson & Norris Company at the stipulated sum of $15 per day for each truck, Gier to furnish trucks and chauffeurs. Gier testified:

"I do work for Thompson-Norris Company, corrugated paper factory. I do their business as they want it, ten trucks, or twelve trucks, or one truck, or two trucks, I send them what trucks they need, with no contract. I have three trucks of my own, and when I run short I go outside and hire trucks from somebody else. * * * I give the shipping clerk the authority to send my trucks where he pleases."

If the company did not like the chauffeur, they would tell Gier not to send him. It had no right to discharge him ,but would notify his employer, Gier. Gier by oral contract agreed to do the trucking for the Thompson & Norris Company at $15 per truck per day, and the only control which the company had over the chauffeurs was to tell them where to go and what to bring or carry. On the day in question the company wanted more trucks than Gier had, whereupon he sent to the E. & R. Trucking Company for an additional truck. This was operated by a chauffeur named Henry Wichser, under the same conditions and arrangements as were Gier's trucks. The E. & R. Trucking Company received $15 a day. Wichser was paid by it $4 a day.

Wichser stood in the same relationship to the Thompson & Norris Company as did Gier's chauffeurs. Wichser was injured while assisting in putting a roll of paper on his truck. From his injuries he died. Was he at the time in the employ of Thompson & Norris Company of New Jersey?

[3] Under the authorities of Hartell v. Simonson & Son Co., supra, and Kellogg v. Church Charity Foundation of L. I., supra, this company was not the special employer of Wichser and an award against it on such basis cannot be sustained.

The order appealed from should be reversed, and the claim dismissed, with costs in all courts against State Industrial Commission.

CHASE, J. (dissenting). I dissent solely on the ground that I do not think Gier or Reyelts and Eppler were independent contractors. The claimant pursuant to his employment was engaged at the time of his injury with a conceded employee of the Thompson & Norris Company, loading the truck of which he was in charge. The Thompson & Norris Company engaged trucks and chauffeurs at a given price per day as laborers are employed from any agency, not to perform a separate and independent piece of work, but to do the work of the Thompson & Norris Company of a particular kind in connection with their general work as manufacturers of paper goods. The claimant was required, in connection with other employees of the Thompson & Norris Company, to load the truck,

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and then, after driving the same to the place for the delivery of the goods, to assist such employees in unloading it, all in pursuance of the directions of the Thompson & Norris Company. These facts are sufficient to sustain the finding of the commissioners, in substance, that the claimant was a special employee of the Thompson & Norris Company. Matter of Dale v. Saunders Bros., 218 N. Y. 59, 112 N. E. 571, Ann. Cas. 1918B, 703; Matter of De Noyer v. Cavanaugh, 221 N. Y. 273, 116 N. E. 992; Matter of Nolan v. Cranford Co., 219 N. Y. 581, 114 N. E. 1074.

Hiscock, C. J., and Cardozo and McLaughlin, JJ., concur with Crane, J.

Hogan and Elkus, JJ., concur with Chase, J.

Order reversed, etc.

FOX v. BACHNOR BROS. CO., Inc., et al.

(New York Supreme Court, Appellate Division, Third Department. May 5, 1920.)

182 New York Supplement. 416.

MASTER AND SERVANT— "FULL WEEKLY WAGE" AS BASIS OF COMPENSATION TO EMPLOYEE RECENTLY EMPLOYED DEFINED.

Where a glove maker working at home had been so engaged for only five weeks and was new to the work, so that the highest weekly wage she had earned was $3.60, and the lowest was 25 cents, the "full weekly wage" to be taken as a basis for an award for compensation, under Workmen's Compensation Law, § 15, subd. 5, for the partial loss of the use of the right leg, was the average wages of an employee of the same class in similar employment in the same or neighboring place, under section 14, subd. 2.

(For other cases ,see Master and Servant, Dec. Dig. § 385[8].)

(For other definitions, see Words and Phrases, Full Wages.)

Appeal from Award of State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Rose Fox to recover for personal injuries, opposed by the Bachnor Bros. Company, Incorporated, employer, and the Travelers' Insurance Company, insurance carrier. From an award by the State Industrial Commission for 90 per cent. of the loss of the use of the right leg, the employer and insurance carrier appeal. Reversed, and remitted to the Commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Amos H. Stephens, of New York City (E. C. Sherwood, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Asst. Atty. Gen., of counsel), for State Industrial Commission.

Henry T. Kellogg, J. The claimant has been awarded compensation for 90 per cent. of the loss of the use of the right leg, at a rate calculated upon the basis of a weekly wage of $9. At the time of her injury she had

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been engaged in the manufacture of gloves for the period of five weeks. She fetched the gloves upon which she worked to her home, and there performed her work. The highest weekly wage she had earned was $3.60, and the lowest was 25 cents. It is plain that this is not a case where weekly wages may be determined by applying the provision of subdivision 1 of section 14 of the Workmen's Compensation Law (Consol. Laws, c. 67), for the reason that the claimant had not been employed substantially for a year immediately preceding the injury. As the claimant was new to the work, it would also be unfair to estimate her weekly wages by using as a sole criterion the actual earnings made by her.

We must have recourse, therefore, to subdivision 2 of the section, and take as a standard the average wages of an employee of the same class in a similar employment in the same or a neighboring place. It appeared without contradiction that employees in this vicinity, who took gloves home for work thereupon, averaged $3 per week. It is provided in subdivision 5 of section 15 that for the loss of a leg the compensation awarded shall not be less than $5 a week. This provision is immediately succeeded by the following condition:

"Provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages."

It is evident, therefore, that the compensation payable is $3 per week, for, under the method of determining wages which must be used here, that is the sum which must be regarded as the "full weekly wages" of the claimant.

The award is reversed, and the claim remitted to the commission for further action in the premises in accordance herewith. All concur.

LOUIS BOSSERT & SONS, Inc., v. PIEL BROS., Inc.

(New York Supreme Court, Appellate Term, Second Department. May Term, 1920.)

182 New York Supplement, 620.

1. MASTER AND SERVANT—WORKMEN INJURED BY THIRD PERSON MAY ELECT TO SUE HIM OR ACCEPT COMPENSATION.

Under Workmen's Compensation Law, § 29, an employee, injured by a third party, may elect to accept the statutory compensation, or to sue the third party as though the Workmen's Law did not exist; but, if he takes compensation, he cannot later sue the third party, for in that event his claim against the third party is assigned to the person paying the compensation.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

2. MASTER AND SERVANT—EMPLOYER PAYING COMPENSATION MAY RECOVER FROM WRONGDOER MORE THAN AMOUNT PAID.

Where employer, having paid the statutory compensation to his employee, injured by the negligence of another, sues such other under Workmen's Compensation Law, § 29, the amount recoverable in such suit is not limited to the amount paid as compensation, but all that is recovered

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above the amount paid as compensation is for the benefit of the injured employee.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

3. MASTER AND SERVANT — NEITHER INJURED EMPLOYEE NOR DOCTOR CAN SUE EMPLOYER FOR MEDICAL SERVICES.

An injured employee cannot sue his employer for his medical expenses, although Workmen's Compensation Act, § 13, requires the employer, after notice, to furnish such services; nor can a doctor, who has rendered services to such employee, sue his employer therefor.

(For other cases, see Master and Servant, Dec. Dig. § 393½.)

4. MASTER AND SERVANT — EMPLOYER NOT SUBROGATED TO EMPLOYEE'S RIGHTS AGAINST WRONGDOER, FROM WHOM EMPLOYEE RECOVERS AMOUNT EXCEEDING STATUTORY COMPENSATION.

Where employee, injured by third party, received from him, in compromise of action against him, a sum in excess of the compensation recoverable under the Workmen's Compensation Law, his employer, not consenting to the settlement, could not recover from such third party, under section 29, the amount of value of medical services rendered to the employee, paid by the employer, for, while the cost of furnishing medical attendance is a part of the statutory compensation, the statute is clear that, when an employee recovers from a third party more than the compensation would be under the statute, the employer is not subrogated to any of the employee's rights against the third party.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Appeal from Municipal Court, Borough of Brooklyn, Third District.

Action by Louis Bossert & Sons, Incorporated, against Piel Bros., Incorporated. From a judgment for defendant, after trial before the court without a jury plaintiff appeals. Affirmed.

Argued May term, 1920, before Clark, Kelby, and Cropsey, JJ.

Maurice B. Rich, of New York City (Alex. M. Hamburg, of Brooklyn, of counsel), for appellant.

Fitch & Grant, of New York City (Robert A. Peattie, of New York City, of counsel), for respondent.

CROPSEY, J. An employee of the plaintiff in the performance of his work was injured through the carelessness of the defendant. The plaintiff was a self-insurer under the Workmen's Compensation Law (Consol. Laws, c. 67), but the employee elected not to take compensation under the statute, but instead to sue the defendant. Such an action was begun, and later compromised for a sum in excess of the amount of the compensation which the employee could have received under the statute. The plaintiff did not consent to the settlement. The plaintiff furnished medical attendance for the injured employee under the provisions of the Workmen's Compensation Law (section 13), and expended $182.50 therefor. In this action plaintiff seeks to recover that sum, and also a further sum for the damage to its truck, which was occasioned at the time of the accident to its employee. The court below gave the plaintiff judgment for the amount of damage to its truck, but refused to allow its claim for the medical expenses. The plaintiff appeals from the latter part of the court's decision. The sole question for review is whether the defendant

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is liable at the suit of the plaintiff for the value of the medical services which the plaintiff paid.

[1, 2] The Workmen's Compensation Law takes no right from an injured employee which otherwise he would have had against a third party. Instead, it gives him an additional right, namely, the right to compensation from his employer. He can elect to accept the compensation under the statute, or he can sue the third party as though the Workmen's Compensation Law did not exist. Miller v. N. Y. Railways Co., 171 App. Div. 316, 318, 157 N. Y. Supp. 200; Sabatino v. Crimmins Construction Co., 102 Misc. Rep. 172, 175, 168 N. Y. Supp. 495, affirmed 186 App. Div. 891, 172 N. Y. Supp. 917. If he elects to take compensation, then he cannot later sue the third party whose negligent act injured him. Hanke v. N. Y. Consolidated R. R. Co., 181 App. Div. 53, 168 N. Y. Supp. 234. In that event his claim against the third party is assigned to the person paying the compensation by virtue of the provisions of section 29 of the statute. That party may then sue the wrongdoer, and may recover in the same manner as the injured employee could have recovered, had he brought suit against the wrongdoer; and the amount that may be so recovered is not limited to the amount paid as compensation. Casualty Co. of America v. Swett Electric Light & Power Co., 174 App. Div. 825, 162 N. Y. Supp. 107. There is a case holding that the recovery is limited to the amount of compensation actually paid (United States Fidelity & Guaranty Co. v. New York Rwys. Co., 93 Misc. Rep. 118, 156 N. Y. Supp. 615); but the language of the section seems to support the Appellate Division decision. That is in line with the intention of the statute not to take away from an employee his rights or remedies against third parties and to permit him to recover pay for injuries received with little delay and little expense. Paying the compensation, the employer may then sue the wrongdoer, and all that is recovered above the amount paid as compensation is for the benefit of the insured employee. Casualty Co. of America v. Swett Electric Light & Power Co., supra. If, however, the employee prefers to sue the third party, he may do so, and if he recovers less than the compensation provided by the statute his employer must make good the difference. Section 29.

There is a conflict of opinion as to whether, in order to hold the employer for that difference, the employee must give notice of his election to sue the third party. In Lester v. Otis Elevator Co., 169 App. Div. 613, 155 N. Y. Supp. 524, it is held that he must give such notice, else he cannot later obtain any compensation. The contrary is held in Matter of Woodward v. Conklin & Son, Inc., 171 App. Div. 736, 157 N. Y. Supp. 948. The Lester Case points out that the statute says the employee may elect, and the election "be evidenced" in such manner as the commission may prescribe, and that any compromise for a sum less than the amount of the compensation "shall be made only with the written approval" of the employer or insurance carrier. These provisions the court holds clearly indicate that, unless the employee does evidence his election, as required, he cannot have any claim for compensation later, no matter how little he recovers from the third party. The decision in the Matter of Woodward proceeds on the theory that the statute was passed to protect employees even against their own foolishness, and holds, in effect, that although an employee sues a third party, without giving evidence of his intention, he does not lose his right to compensation, if his recovery against the third party is less than the statute provides. For the purpose of this appeal it is not necessary to determine which of these contentions is correct.

[3, 4] Where an employee recovers more from the third party than the statute would give him, he has no claim against his employer; and, irrespective of whether he has recovered from the third party, an employee cannot sue his employer for his medical expenses, although the

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statute (section 13) requires the employer, after notice, to furnish such services. Semmen v. Butterick Publishing Co., 101 Misc. Rep. 285, 166 N. Y. Supp. 993, approved in Goldflam v. Kazemier & Uhl, Inc., 181 App. Div. 140, 168 N. Y. Supp. 87. Nor can a doctor or attorney who has rendered services to the injured employee sue his employer therefor. Bloom v. Jaffe, 94 Misc. Rep. 222, 157 N. Y. Supp. 926; Hirsch v. Zurich General A. & L. Ins. Co., Ltd., 97 Misc. Rep. 360, 161 N. Y. Supp. 380. All these decisions are based on the fact that no such right of action is given by the statute, and that, on the contrary, the statute makes such expenses a part of the compensation provided, and the amount thereof a lien upon the compensation fund. Section 24. There is no provision of the statute giving the employer a right of action against a wrongdoer who has injured his employee, except he acquire that right from the injured employee by paying compensation under the provisions of section 29; and while the cost of furnishing medical attendance is a part of the compensation provided by statute, the intent of the statute is clear that, when an employee recovers from a third party more than the compensation would be under the statute, the employer is not subrogated to any of the employee's rights against the third party. Appellant's counsel concedes that its right must be found in section 29. If it is not there, it does not exist. We do not find any such right given by that or any other section.

The judgment should be affirmed, with costs.

Clark and Kelby, JJ., concur.

MICHEL v. AMERICAN CINEMA CORPORATION.

New York Supreme Court, Special Term, New York County. June 10, 1920.)

182 New York Supplement, 588.

1. MASTER AND SERVANT—"TAKING OF MOVING PICTURE" NOT "MANUFACTURE OF MOVING PICTURE FILM," WITHIN COMPENSATION LAW.

The words "manufacture of moving picture film," within Workmen's Compensation Law, § 2, group 45, refers to the process of making the films in their original form, the process of impressing the picture upon them being ordinarily spoken of as the taking of the picture, so that an actress who was injured while performing for a moving picture film was not within that provision of the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT—ANSWER MUST SHOW EMPLOYMENT WITHIN COMPENSATION LAW.

An answer seeking to bring an employee within Workmen's Compensation Law, § 2, group 45, including employments in which four or more workmen or operatives are regularly engaged or employed in the same business or about the same plant, which fails to allege that she was one of four or more operatives regularly employed, is demurrable.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

3. MASTER AND SERVANT—COMPLAINT NOT SHOWING EMPLOYMENT WITHIN COMPENSATION LAW NEED NOT ALLEGE EMPLOYER'S FAILURE TO INSURE.

A complaint for personal injuries to an employee, which does not allege facts bringing plaintiff within the Workmen's Compensation Law,

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need not allege the employer's failure to secure payment of compensation as provided by that law.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Action by Nellie Michel against the American Cinema Corporation. On motion to sustain plaintiff's demurrer to the third separate defense contained in the answer. Motion granted, with leave to defendant to amend.

J. Preston Mottur, of New York City, for the motion.

Benjamin C. Loder, of New York City (William C. Olsen, of New York City, of counsel), opposed.

GIEGERICH, J. The plaintiff moves for an order sustaining her demurrer to the third separate defense contained in the defendant's answer. The complaint alleges that the defendant is engaged in the business of producing motion picture films, and that the plaintiff's occupation is that of a theatrical and motion picture performer, and that the plaintiff was employed by the defendant to perform for it in the production of a motion picture film known as the "Innervoice," which film was being produced at a certain building known as the Mirror Studios, in the borough of Queens, city of New York, and that while so employed the plaintiff was taking part in what is known as a barroom scene in said motion picture, and that while standing with a large number of other characters on a balcony erected for such scene by the defendant the balcony collapsed, throwing the plaintiff violently to the floor beneath, whereby she sustained the injuries complained of. The defense demurred to sets up the Workmen's Compensation Law (Consol. Laws, c. 67) and pleads specifically group 40 and group 45 of section 2 of that act, which are as follows:

"Group 40. Printing, engraving, photo engraving, stereotyping, electrotyping, lithographing, embossing; manufacture of moving picture machines and films; manufacture of stationery, paper, cardboard boxes, bags or wallpaper, and bookbinding."

"Group 45. All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants."

The defense demurred to further alleges that the defendant, pursuant to the terms of the said statute, duly secured compensation to its employees under the act and notified them thereof, and consequently that no action at law for damages can be maintained.

[1] I do not think the portion of the statute first above quoted covers the work in which the plaintiff and defendant were engaged at the time of the injury. The words "manufacture of moving picture * * * films" refers, in my opinion, to the process of making the films in their original form and before any impression of a picture has been made upon them, and the meaning of these words should not be extended to the subsequent process of transferring to such blank films the impressions of pictures. The latter process is in ordinary parlance the taking of the picture, just as the original process is the manufacture or making of the film. It may be true that the term "film" is applied to the thin, flexible, sensitized sheet, both in its original form and in its condition after the impression of the picture has been made upon it. Nevertheless I think in the ordinary use of language the words "manufacture of a film" would be taken to refer only to the original process, and that the subsequent pro-

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cess would be spoken of as the taking of the picture, or, if the word "film" were used, as the production, rather than the manufacture, of the film. It is significant in this connection that the complaint alleges that at the time of the injury "the plaintiff was employed by the defendant to perform for it in the production of a motion picture film known as the 'Innervoice,' which motion picture film was being produced at the said Mirror Studios." It may be observed further that the answer admits that the defendant was engaged in the business of "producing and manufacturing motion picture films," although it is also alleged in the answer that at the time of the injury it "was engaged in making a motion picture film." My conclusion is that the process in which the plaintiff and defendant were engaged at the time of the injury was not the manufacture of a motion picture film, and consequently that the case is not embraced within group 40.

[2] With respect to the provisions contained in group 45, it is argued in behalf of the defendant that there is nothing in the complaint to indicate that the plaintiff was not a workman or operative, and from this the inference seems to be drawn that the plaintiff's case comes within group 45. If the applicability of group 45 turned upon the question of whether the plaintiff was or was not a workman or operative, I would hold that the complaint shows that she was neither one; but, in my opinion, it cannot be held that the present case falls within group 45, unless it is shown that four or more workmen or operatives were regularly employed in the same business or in or about the same establishment, but neither the complaint nor the defense in question contains any allegation on this point. There is therefore nothing in the pleadings to show that this case comes within the provisions of group 45.

[3] Upon the theory that a demurrer searches the record and goes back to the first bad pleading, the defendant makes the further argument that the complaint is defective, in that it does not allege that the defendant failed to secure payment of compensation for injured employees and their dependents as provided by the Workmen's Compensation Law. If the complaint showed that this case was one covered by the Workmen's Compensation Law, then it may be conceded that it would be necessary for the plaintiff to go further and to take the case out of the statute by alleging such failure on the part of the employer; but, inasmuch as no facts are pleaded to bring the case within the statute, it is not necessary to plead such failure in order to take it out of the statute again. Nilsen v. Am. Bridge Co., 221 N. Y. 12, 116 N. E. 383.

The motion should therefore be granted, with $10 costs, with leave to the defendants to amend within 20 days after service of a copy of the order to be entered hereon, with notice of entry thereof, and on payment of such costs. Settle order on notice.

WILLIS v. STATE INDUSTRIAL COMMISSION ET AL. (No. 10816.)

(Supreme Court of Oklahoma. March 30, 1920. Dissenting Opinion April 20, 1920. Rehearing Denied May 18, 1920.)

190 Pacific Reporter, 92.

(Syllabus by the Court.)

1 MASTER AND SERVANT—INJURY BY "HORSEPLAY" OF CO-EMPLOYEE HELD TO "ARISE OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where an employee, during an interval in his work, was warming himself by a fire on the premises of the employer, and was injured by the

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explosion of a piece of dynamite containing a cap, brought there and thrown into the fire by a fellow employee, who picked up the dynamite and threw in the fire to see if it would explode, the injury received by the employee arose out of and in the course of his employment under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Higgins, Pitchford, and Bailey, JJ., dissenting.

Action by Lon Willis to review the decision of the State Industrial Commission of the State of Oklahoma, denying petitioner compensation under the Workmen's Compensation Act, in proceeding under the act opposed by Alko Nak Coal Mining Company and another. Cause reversed and remanded, with directions.

E. W. Smith, of Henryetta, for petitioner.
Hummer & Foster, of Henryetta, for respondents.

JOHNSON, J. This action was commenced in this court on the 9th day of August, 1919, for the purpose of reviewing a decision of the State Industrial Commission rendered on the 14th day of July, 1919, wherein the petitioner was denied compensation under the Workmen's Compensation Act (chapter 246, S. L. 1915).

The findings of the commission were as follows:

"The facts in this case agreed upon are as follows: It is agreed between the claimant and respondent Alko Nak Coal Mining Company and Coal Operator's Exchange that on the 18th day of February, 1919, the employees of the Alko Nak Coal Mining Company had been accustomed, during the hours of their service, when not actually engaged in their work, to stand by a fire that was kept on the premises, with the knowledge and acquiescence of the company, for the purpose of providing a place where they could be comfortable while not actually engaged at work, and such fire was had with the permission of the company.

"The facts further show that claimant and three other workmen on February 18, 1919, were warming by the fire at an interval in their work, and were not actually working at that particular time, but were on the pay roll and their time was going on. A fellow employee came along where they were warming around the fire, and threw a piece of split dynamite in the fire. When the dynamite was thrown into the fire the fellow servants, after being warned, all ran away, except claimant, who had his shoe off trimming a corn. Claimant saw an old piece of dynamite, but not the cap. The fire was on the premises of the company where claimant was working. Claimant's daily wage was $5.40."

After the foregoing findings of fact, the commission made the following order, to wit:

"Now on this July 14, 1919, this cause coming on to be heard in its regular order pursuant to a hearing held in Henryetta on June 12, 1919, at which hearing the claimant was present in person and by his attorney, E. W. Smith of Henryetta, and respondent and insurance carrier by their attorneys, Hummer and Foster of Henryetta, and the commission after examining the testimony, briefs of counsel, filed in the case, and being otherwise well and sufficiently advised in the premises, finds that the injury complained of did not arise out of and in the course of his employment with respondent, and that compensation should be denied.

"It is ordered that compensation in the above claim be denied."

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The commission further finds:

"That the injury did not arise out of and in the course of his employment, and that compensation should be denied."

Petitioner makes the following assignments of error:

(1) That the commission erred in holding that the injury complained of did not arise out of and in the course of the employment of the petitioner.

(2) That said award or decision is contrary to law.

(3) That said award or decision is not supported by the evidence and is contrary to the evidence.

And then states in his brief as follows:

"While there are three assignments of error in the petition filed herein by the petitioner, it is our purpose to treat them all under the first assignment, which fairly covers the entire objection to the ruling of the commission."

"(1) That the commission erred in holding that the injury com plained of did not arise out of and in the course of the employment of the petitioner."

It is provided by section 1, article 2, of the Workmen's Compensation Act (chapter 246, S. L. 1915) that:

"Every employer subject to the provisions of this act shall pay or provide as required by this act compensation according to the schedules of this article for the disability of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury except where the injury is occasioned by the willful intention of the injured employee to bring about the injury of himself or of another, or where the injury results directly from the willful failure of the injured employee to use a guard or protection against accident furnished for his use pursuant to any statute or order of the State Labor Commission or results directly from the intoxication of the injured employee while on duty."

It is also provided by section 11, article 2, of the Workmen's Compensation Act (chapter 246, S. L. 1915) that:

"In any proceeding for the enforcement of a claim * * * under this act, it shall be presumed in the absence of substantial evidence to the contrary."

1. "That the claim comes within the provisions of this act." We agree with counsel for respondents that the words "arising out of" and "in the course of employment" are conjunctive, and relief can be had under the act only when the accident arose both "out of" and "in the course of" employment.

From the facts found by the commission that the petitioner, "during an interval in his work, was warming himself by a fire on the premises of the employer, was injured by the explosion of a piece of dynamite containing a cap, brought there and thrown into the fire by a fellow employee, who picked up the dynamite and threw it into the fire to see if it would explode," upon the facts thus found the commission concludes as a matter of law "the injury received by the employee did not arise out of and in th course of his employment under the Workmen's Compensation Law."

Counsel for the respondents say in their brief:

"We shall brief this case under the following proposition of law: The injury to the petitioner, as set forth in the above statement of facts,

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was not an accidental injury sustained by the employee arising out of and in the course of his employment.

"The petitioner urges in his brief that, since it was not shown that he was intoxicated, or failed to use any safeguard provided for his safety, or that he brought his injury about willfully, the respondents are liable to him for compensation, as he was where he had a right to be. Of course if this were a true statement of the law, there would be no defense to this case, for it is not contended by the respondents that the petitioner was not in the employ of the company, or that he was in a place where he had no right to be, but it is not sufficient under the many decisions of the various Supreme Courts and commissions construing the provision 'out of and in the course of employment' that the injury he received while the employee was working for his employer. This is probably sufficient to warrant the statement that the injury was received while in the course of his employment, but does not come within the provision 'arising out of the employment.' It is held by practically all of the decisions that the words 'arising out of' and 'in the course of employment' are conjunctive, and relief can be had under the act only when the accident arose both 'out of' and 'in the course of employment The injury must be received: (1) While the workman is doing the duty he is employed to perform; and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work."

These clear statements of counsel for respondents of their position very greatly simplify the case; it being admitted that the petitioner was an employee of the company, and that he was in a place where he had a right to be, and that the injury was received while in the coures of his employment, leaves the only question to be determined, Did his injuries come within the provision "arising out of the employment"?

In Honnold on Workmen's Compensation, vol. 1, § 101, in discussing the question here involved, it is said:

"According to the usual language of the acts, to warrant recovery of compensation for the injury or death of a workman, the injury must be one 'arising out of and in the course of' his employment. This phrase is used in the same sense in the acts of England and of many of the states, and, though its literary construction is well settled, its application to particular cases has given rise to differences of opinion not easily harmonized. Attempts of the courts to formulate general rules relative to the distinction between the terms 'out of' and 'in the course of' have not been entirely successful. All agree, however, that the terms are not intended to be synonymous. An injury may be received in the course of employment, and still have no causal connection with it, so that it can be said to arise out of the employment. But it is difficult, if not impossible, to conceive of an injury arising out of and not also in the course of the employment. The importance of distinguishing between these terms arises from the facts that each represents an element essential to, but not authorizing, recovery of compensation without the presence of the element represented by the other. In other words, even though the injury occurred 'in the course of' the employment, if it did not arise 'out of the employment' there can be no recovery. Yet, in the words of an English jurist: 'If you find that the accident arose in the course of the employment, you may have gone a certain way towards finding that it arose out of the employment, but you have not gone the whole way.' The words, 'out of' point to the origin and cause of the accident or injury; the words, 'in the course of' to the time, place, and circumstances under which the accident or injury takes place. The former words are descriptive of the character or quality of the accident; the

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latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves the idea that the accident is in some sense due to the employment. It must result from a risk reasonably incident to the employment."

If it be, as stated in the text quoted supra that "the words 'out of' point to the origin and cause of the accident or injury," and the commission having found that the injury was caused by a fellow employee, and it being admitted that the petitioner was an employee, and was where he had a right to be, it seems to us that it necessarily follows that the accident was due to the employment, and resulted from a risk reasonably incident to the employment.

The author cites in support of the text the decisions of the cases of Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458; Buckley, L. J., in Fitsgerald v. Clark & Son, 2 K. B. 796; Hulley v. Moosbrugger, 87 N. J. Law, 103, 93 Atl. 79; Zabriskie v. Erie R. Co., 85 N. J. Law, 157, 88 Atl. 824; Terlecki v. Strauss, 85 N. J. Law, 454, 89 Atl. 1023; Armitage v. Lancashire & Yorkshire Ry. Co., 2 K. B., 178; Collins v. Collins, 2 I. R. 104; Murphy v. Berwick, Ir., 1. T. R. 126; Blake v. Head, 106 L. T. R. 822. In the case of Scott v. Payne Bros., 85 N. J. Law, 446, 89 Atl. 927, it was said:

"An injury arises out of and in the course of employment where at the time and place of its occurrence the workman is doing what he might reasonably then do."

To the same effect was the holding of the Supreme Court of Kansas in the case of Thomas v. Proctor & Gamble Mfg. Co., 104 Kan. 432, 179 Pac. 372; N. W. Iron Co. v. Industrial Commission et al., 160 Wis. 633, 152 N. W. 416; Whiting-Mead Commercial Co. v. Indus. Accident Com., 178 Cal. 505, 173 Pac. 1105. This court in the case of Wick et al. v. Gunn et al., 169 Pac. 1087, 4 A. L. R. 107, in an opinion by Stewart, C., said in paragraph 1 of the syllabus thereof:

"The Workmen's Compensation Act of this state (Laws 1915, c. 246) must be construed as a whole, and all presumptions indulged will be in favor of those for whose protection the statutory compensation was fixed, and who, by the terms of the act, are deprived of the ordinary remedies open to others whose rights are invaded."

Such was the holding of this court in the case of Adams v. Iten Biscuit Co., 162 Pac. 938.

[1] We think the correct rule is, and so hold in these cases, that if a workman is an active participant in what has been denominated "horseplay," he is not entitled to compensation, but if, while going about his duties, he is a victim of another's prank, to which he is not in the least a party, he should not be denied compensation. 53 Am. Law Rev. p. 75; Harrison v. Central Const. Corporation et al. (Md.) 108 Atl. 874.

[2] We are of the opinion that the conclusion reached by the commission was erroneous, and the cause is therefore reversed and remanded with directions to proceed in accordance with the views herein expressed.

Owen, C. J., and Kane, McNeill, and Rainey, JJ., concur.

Pitchford, Higgins, and Bailey, JJ., dissent in an opinion by Higgins, J.

HIGGINS, J. (dissenting). I dissent from the opinion of the majority in the application of the law to the facts in this case I do not question but what the injury in the instant case to the employee was in the course of his employment, but I do not believe from the facts and circumstances of the case that it arises out of his employment. As to an in-

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jury to an employee arising out of his employment, Honnold at section 115 states as follows:

"The use of the words 'arising out of,' or words of similar import, makes it a condition precedent to the right to recover compensation that the occurrence shall have resulted from a risk reasonably incident to the employment; that there be causal connection between the conditions under which the employee worked and the resulting injury. While the occurrence need not have been foreseen or anticipated, it must appear after the event to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In this case there is no contention in the briefs or finding in the opinion of the majority that there was a connection between the throwing of the piece of dynamite in the fire, which caused the injury, and the work being done there by the party injured or by his fellow workman, who threw the dynamite in the fire. The opinion of the majority is in error in citing Hulley v. Moosbrugger, 87 N. J. Law, 103, 93 Atl. 79, for the reason the opinion in that case is overruled and reversed in the same court at a later date, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203. That was a case in which it was claimed that the injury suffered arises out of the employment, and goes into detail as to when an injury arises out of the employment, and is as follows:

"It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it 'arises out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Applying this law to the facts of the instant case, where is the causal connection between the throwing of the piece of dynamite in the fire and the work being done and the party injured? Was the throwing of the piece of dynamite in the fire a natural incident of the work? Would the injured party have been equally exposed to this hazard apart from his employment? Was the causative danger, that is of throwing the dynamite in the fire, peculiar to the work and not common to the neighborhood? Was it incidental to the character of the business and dependent on the relation of master and servant? Did the throwing of the dynamite in the fire, have its origin in the risk connected with the employment, or flow from that source as a rational consequence? If so, compensation should be allowed; if not, it should be refused. In my judgment the throwing of dynamite in the fire by a fellow servant, in play, and the resulting injury is not an injury arising out of the employment. The throwing of the dynamite in the fire was not a natural incident to the risk; neither was it peculiar thereto. It is stated in the opinion as a reason why petitioner should recover:

"If it be, as stated in the text quoted supra, that 'the words "out of" point to the origin and cause of the accident or injury,' and the commis-

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sion having found that the injury was caused by a fellow employee, and it being admitted that petitioner was an employee, and was where he had a right to be, it seems to us that it necessarily follows that the accident was due to the employment, and resulted from a risk reasonably incident to the employment."

If this be a correct doctrine, then an employer becomes an insurer if his servant is at a place he has a right to be when injured, and is injured by a fellow servant, regardless of what may have caused the injury, for the reason that it is stated that when these two conditions exist, then there necessarily follows that the accident arises out of the employment and from a risk reasonably incident to the same. I do not believe this is sound reason or correct law. It merely goes a portion of the way. It leaves out the question whether or not the injury arises out of the employment, which is the sole issue to be tried in this case. Neither in the briefs nor in the opinion of the majority is there any contention that the throwing of the dynamite in the fire had any connection with the work being done. It was totally foreign to same. The throwing of the same in the fire was merely a prank of a fellow employee, commonly called horseplay or skylarking.

Whether or not an employee can recover for an injury brought about through a joke, horseplay, prank, or skylarking of a fellow employee is set forth in section 121, Honnold:

"Unless the workman is actually engaged at the particular time in the performance of some duty which contributes to the injury, an injury to a workman from skylarking or horseplay or practical joking, though it may arise in the course of, cannot be said to arise out of, the employment. whether the injured person instigated the occurrence or took no part in it."

It will thus be seen that the general rule is that recovery cannot be had for an injury brought about by skylarking or horseplay of a fellow employee. There are many opinions upholding this doctrine, too numerous to mention. The footnotes of Honnold cite many.

Where an employee, who was peculiarly susceptible to being tickled, was going down a flight of stairs with a filled bucket, and one of associates punched him in the back with a newspaper, causing him to make a sudden movement and to fall, injuring one knee seriously, it was held that the injury was in the course of, but did not arise out of, his employment. Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164.

A fellow employee directed a trick camera toward the claimant, and a missile from the camera hit him in the eye, and the sight of the eye was destroyed. It was held that the injury did not arise out of the employment. Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215.

An injury from a stream of hot water turned on an employee by a fellow employee as a practical joke was held not to arise out of the employment. Vittorio v. California Battery Co., 3 Cal. Industrial Commission 26.

Our laws relating to workman's compensation are similar to the New York statute. Laurino v. Donovan et al., 183 App. Div. 168, 170 N. Y. Supp. 340, is a case very similar to this case. In that case a fellow employee injured another by the explosion of a percussion cap with which he was experimenting. The court held:

"Where a chauffeur, doing his master's work in a garage, was injured by the explosion of a percussion cap brought in by another chauffeur, his fellow servant, with which the latter was experimenting, the injury to the first chauffeur did not arise out of his employment, within the workman's compensation law * * * to entitle him to an award."

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The authorities on this point are collected in review. Ann. Cas. 1913C, 1; Ann. Cas. 1914B, 498; Ann. Cas. 1916B, 1293; Ann. Cas. 1917C, 760; Ann. Cas. 1918B, 768; Ann. Cas. 1918E. 1164. In the many cases cited in the opinion of the majority, none hold to the contrary of this general rule, but it is held in some that there may be circumstances which will take it out of the general rule, for instance in the case of Thomas v. Proctor, cited. Therein a girl employee was riding upon a truck, and fell therefrom and was injured. The riding upon the truck seems to have been in play. The custom of riding this truck at the noon hour was within the knowledge and with the express consent of the foreman, and, the court found, was one of the conditions upon which the business was carried on, and for that reason the case did not fall within the general rule, though the girl was injured while at play. It has been further held that, where horseplay has grown into a custom and to the knowledge of the employer, he may be held liable for injury resulting therefrom. White v. Stockyards, 104 Kan. 90, 177 Pac. 522. In all these cases cited there are some circumstances taking the case out of the general rule in which the courts have ever held that an employee can recover where the injury is by a fellow employee while engaged in horseplay or skylarking.

In this case there are no circumstances of any kind whatsoever taking the case out of the general rule. It was a prank of a fellow employee, commonly called horseplay or skylarking, pure and simple, and nothing else; and for that reason, and in keeping with the authorities above cited as I understand them, I do not believe that the petitioner should recover in this case.

In the opinion of the majority there is laid down as a principle of law that, if one is the victim of the prank of a fellow employee to which he, the injured employee, is not a party, he should be allowed compensation. To fortify this principle there are two authorities cited. An examination of the Maryland case throws no light upon the subject whatsoever as there is no contention in that case that the employee was injured by a prank of another employee. The other (53 Amer. Law Review, p. 75) is a quotation from a paper prepared by the commissioner of the Workmen's Compensation Board of the Province of Ontario, and read at an international meeting of Industrial Boards at Madison, Wis., in which the writer stated:

"Our board in Ontario has adopted the rule in these cases if while he [the injured party] is going about his duties he is the victim of another's prank to which he is not in the least a party, we do not deny him compensation."

This paper states that a board, not a court, has adopted a rule, not construed law, that an employee is not denied compensation if injured by the prank of a fellow employee if he, the injured employee, is not a party to the prank.

There is to the contrary of this principle section 121 of Honnold on Workmen's Compensation, above cited in this opinion, that if the injured party was injured by horseplay or prank of a fellow workman he cannot recover, even though he took no part in it. In Hulley v. Moosbrugger, supra, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203, this identical issue was passed upon, the court holding:

"An employer is not liable under the Workmen's Compensation Act * * * to make compensation for injury to an employee, which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances, may arise in the course of, it cannot be said to arise out of, the employment."

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Similar holdings are made in the following cases: Knopp v. Amer. Car Co., 186 Ill. App. 605; De Filippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761.

I do not believe that this principle of law that a fellow workman may recover if an injury is caused by the prank of a fellow workman if he, the injured party, was not a party to the prank is upheld by the light of judicial decision, but to the contrary all appellate courts speaking thereon, as far as I have been able to find, have spoken to the contrary. I believe that the opinion of the majority in this case gives no meaning to that part of the statute which states that the injury must arise out of the employment; but that if the injury arose in the course of the employment that it is sufficient for an award of compensation, and by so holding I believe that violence was done to the statute, and for this reason I dissent.

I am authorized to state that Pitchford and Bailey, JJ., concur in this dissenting opinion.

RORVIK v. NORTH PAC. LUMBER CO. et al.

(Supreme Court of Oregon. June 8, 1920.)

190 Pacific Reporter 331

5. MASTER AND SERVANT—SUBROGATION UNDER FOREIGN COMPENSATION ACT HELD UNENFORCEABLE BECAUSE CONTRARY TO LAW OF FORUM.

The provision of Workmen's Compensation Act Cal. for subrogation to the rights of the injured employee will not be enforced in Oregon, as, under the law of that state, a tort action is not assignable; and hence the fact that the widow of the captain of a vessel, killed at defendants' wharf, presented a claim under the California act against the owner of the vessel, a California corporation, the deceased being a resident of that state, will not preclude the widow's recovery against defendants on the theory the owners of the vessel were subrogated to her rights against defendants. (Per McBride, C. J., and Johns, J.)

For other cases, see Master and Servant, Dec. Dig. § 369.)

6. MASTER AND SERVANT—RESIDENT WRONGDOER SUABLE FOR DEATH OF EMPLOYEE DOMICILED IN SISTER STATE ALLOWING LIMITED COMPENSATION WITH SUBROGATION.

As Workmen's Compensation Act Cal. does not profess to make full compensation for injury, but limits the amount in case of death to $5,000, the fact that the widow of the captain of a vessel killed while superintending loading lumber at defendant's wharf presented a claim against the owner of the vessel, a California corporation, will not, where the owner fails to sue defendant, preclude the widow from suing defendant, in Oregon to recover full compensation for the injury. (Per McBride, C. J., and Johns, J.)

For other cases, see Master and Servant, Dec. Dig. § 369.)

Department 2.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

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Action by A. Maude Rorvik against the North Pacific Lumber Company and H. A. Sargent and others, as receivers. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action brought under the Oregon Employers' Liability Act (Laws 1911, p. 16) for damages for the death of C. P. Rorvik.

The plaintiff is the widow of deceased. The defendant corporation is extensively engaged in the business of manufacturing and dealing in lumber in the city of Portland, and maintains on its premises, and adjoining the Willamette river, a dock, upon which it stores its lumber for sale, and from which the lumber is transferred to vessels for shipment to ports on the Pacific and elsewhere.

At the time of the accident the corporation was in the hands of a receiver, one Henry P. Dutton, but he subsequently resigned, and Sargent, Hawkins & Bradley were appointed in his place, and as such are made defendants.

The particular situation at the time of the accident is described in the complaint as follows:

"That on the 3d day of August, 1916, the said Henry P. Dutton, as receiver, was conducting said business as aforesaid, and was engaged through his servants and employees, in hauling a quantity of lumber to the said wharf of the defendant company, and placing said lumber upon the said wharf in reach of ship's tackle alongside said wharf, so that the same could be loaded upon the steamship Klamath, which was docked at said wharf; that said lumber was placed upon the cars of the said defendant company hereinbefore described, which cars were drawn by a horse, a rope or chain being attached to the rear of said cars extending forward alongside of said cars, to which the horse was hitched, the horse in drawing the same passing alongside of the said track and the cars running thereon; that on the said 3d day of August, 1916, the said C. P. Rorvik was employed by the owner of the said steamship Klamath, and was in charge of the said steamship, and engaged in loading the same at the said wharf of the defendant company with the lumber which was being placed by the said receiver upon the said wharf in reach of the ship's tackle; that at the place where the said steamship was being loaded and the place where the said lumber was being placed upon the wharf by the said receiver the said defendant company and its said receiver maintained several of its said railway tracks, which ran across said wharf at right angles to the water's edge and to the edge of the dock; the floor of said wharf was about eighteen (18) feet from the level of the river; that the said receiver on the said 3d day of August, 1916, or shortly prior thereto, had placed alongside of one of said tracks on said wharf a pile of lumber, said lumber being piled parallel with the said track and to a point within approximately thirty inches of the edge of the said wharf next to the water line; that on the said date last mentioned said C. P. Rorvick, while in the discharge of his duties as a captain of the said steamship Klamath, and engaged in the loading of the said steamship as aforesaid, was standing on said wharf adjoining the river, and while the said Rorvik was standing as aforesaid the said receiver caused two of the said cars of the said defendant corporation, heavily loaded with lumber, to be drawn along the said track last mentioned, which paralleled the said pile of lumber behind which the said Rorvik was standing: the said cars were not fastened together, and the forward car was being shoved forward by the weight of the rear car at the rear end of which the horse was attached as aforesaid; that the said receiver caused and allowed the said cars to be drawn along said track without providing any brakes or other contrivance by which the same could be stopped, and to be propelled in such a way that when the

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horse which was drawing them stopped the said cars would continue upon their journey until they should stop of their own accord; that the said cars and horse were in charge of only one employee of the said receiver; that the said receiver, by his servants, negligently and carelessly piled the said lumber so near to the said track, and placed the lumber upon the said cars in such a position, that when the forward end of the said forward car reached a point on the said track opposite to the said pile of lumber upon the said wharf a portion of the lumber upon the said forward car violently and with great force struck a portion of the said lumber piled upon the wharf, and shoved it forward, causing it to strike the said C. P. Rorvik, by reason of which he was knocked off the said wharf, receiving therefrom mortal injuries, from the effects of which he died on August 8, 1916."

The acts and omissions of defendants which the complaint sets forth as the cause of the accident are stated as follows:

"That the said injuries to the said C. P. Rorvik were caused not through any negligence or lack of care on the part of the said Rorvik, but solely through the carelessness and negligence of the said Henry P. Dutton, as receiver, and his servants and employees, in this: that he negligently and carelessly caused the said cars to be drawn along the said track in such a manner as to strike the lumber piled alongside the said track, and allowed the said cars to be used without devices or appliances with which to keep them under control and stop them, at any given time, quickly and efficaciously and allowed the said cars to be operated by means of a horse pulling on a rope, or similar contrivance attached to the rear of the said cars, in such a manner as to allow the horse to pass along the side track and opposite the said cars, and thus draw the cars forward, and without providing any means for stopping the progress of said cars in the event that the horse was stopped; and by allowing the said forward car to be shoved forward by the force and weight of the rear car, without having it attached to the rear car, and without having any devices or other means for stopping it in the event that the rear car should be stopped at any time; and by allowing the said cars to be operated by one man walking along by the side thereof driving the horse pulling the same, which necessitated said man being in such a position behind the said horse and near the rear of the said cars that it was impossible for him to see the track ahead of said car, or to see the opposite side of the said car, so as to protect persons who might rightfully be in such positions; and by operating said car as aforesaid without formulating, promulgating, or enforcing any rules or regulations, or providing any system of communication by means of signals or otherwise, so as to protect the public from injury by the said cars as they were being shoved forward in advance of the operator along said track; and by operating said cars with one man only, instead of providing a sufficient number of men to enable the operator to keep a watch ahead of the said cars, so as to avoid collissions with obstacles upon or near the track or with persons who might rightfully be in front of said cars; and by piling the said lumber alongside the said track in such proximity to said track that the said loaded cars were unable to pass the same without striking it; and by loading the said cars in such a manner as to allow the lumber placed theron to strike the said lumber piled alongside the said track; and by failure to exercise such care and precaution, which it was entirely practicable to use, to prevent the car of lumber passing along said track from striking the said lumber placed alongside the track."

There were other allegations showing how the defects and omissions above set forth could have been remedied without impairing the usefulness of the agencies used by defendant in loading the vessel.

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The answer denied the material allegations of the complaint; pleaded negligence on the part of plaintiff's intestate as the cause of the injury; and, by way of affirmative defense, set forth the contents of charpter 176 of the Laws of the state of California for the year 1913, known as the "Workmen's Compensation, Insurance and Safety Act," and certain amendments thereto, adopted in 1915, and designated as chapters 541, 607, and 662. The plea is too long to be inserted here, but will be further elaborated in the opinion.

It was then alleged that on the 27th day of October, 1916, plaintiff duly presented her claim to the Industrial Accident Commission, created by this act, against the Klamath Steamship Company, a California corporation and owner of the steamship Klamath, of which deceased was captain, and being the vessel which was being loaded when the accident occurred, said claim being for compensation to plaintiff for the death of her husband by reason of said accident.

The answer alleged that the Klamath Steamship Company answered said claim, and that thereby issues were made up as required in such cases, and that thereafter a hearing was had, and on the 30th day of January, 1917, findings and an award were made in favor of plaintiff and against said steamship company; that thereupon the said company caused the said proceedings to be reviewed upon certiorari in the Supreme Court of the state of California, and upon the hearing there the findings and award of the Industrial Accident Commission were in all things upheld and sustained, and are in full force and effect; that by virtue of the laws of California the liability for compensation provided by said Workmen's Compensation Act was in lieu of any other liability whatever to any person, and that the making of a lawful claim under said act operated as an assignment to the employer of any right to recover damages which the injured employee, his representatives or dependents, had against any other party for such death, and the employer was thereby subrogated to the rights of such party, and that by the making of such claim against an employer before the Industrial Accident Commission such claimant rendered up and canceled his right to make any claim against any other person on account of the death of such employee; that decedent was injured and died in Portland, Or.; that at the time of his death both he and the Klamath Steamship Company were residents of the state of California, and that his contract of employment was made in the state of California.

Plaintiff replied, putting in issue all the new matter alleged in the answer, except that by affirmative allegations she admitted the proceedings before the Industrial Accident Commission, the affirmance of its proceedings before the Supreme Court, but alleged that upon the petition for certiorari the proceedings upon the award were started during the pendency of the review; that the laws of California provide that a litigant shall have 90 days from the rendition of a decision by the Supreme Court of that state to apply for a writ of error to the Supreme Court of the United States and plaintiff alleges, upon information and belief, that the Klamath Steamship Company will apply for said writ; that the award of the Accident Commission is still stayed, and that plaintiff is not entitled to recover thereon or have the same made effective.

Plaintiff filed a supplemental complaint, setting up the proceedings before the Industrial Accident Commission and the Supreme Court, and alleging that since the filing of her complaint, and since the decision of the Supreme Court of California, the Klamath Steamship Company had finally and in writing reassigned any claim which it had by reason of the subrogation claimed in defendants' answer to plaintiff, and that by

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virtue of such assignment plaintiff is now the owner of any claim which said company may have had against defendants.

The supplemental complaint being put in issue by an appropriate answer and reply thereto, the cause came to trial, wherein plaintiff had a verdict and judgment for $12,500, from which defendants appeal. The alleged errors are set forth in the opinion.

S. C. Spencer, of Portland (Emmons & Webster and Wilbur, Spencer, Beckett & Howell, all of Portland, on the brief), for appellants.

Homer D. Angell, of Portland (Ira S. Lillick, of San Francisco, Cal., and Angell & Fisher, of Portland, on the brief), for respondent.

McBride, C. J. (after stating the facts as above). This case presents many intricate propositions, and for that reason we have given a more than usually extended statement of the contentions of the parties as they appear from the pleadings.

[1] It is first contended that plaintiff cannot recover under the Employers' Liability Law of this state, because neither the complaint nor the evidence show that the deceased was an employee of defendant, or that he sustained to it any such relation as brings him within the terms of such act. The complaint and the uncontradicted testimony disclose the following facts:

The evidence indicates that at the time the accident occurred the deceased was captain of the steamship Klamath, and an employee of the Klamath Steamship Company, a California company, and that the ship, at the time of the accident, was taking on a load of timber being shipped by defendants; the lumber was being delivered entirely by the employees of the receiver. Neither the deceased nor any employee of the steamship Klamath had any part therein. But the employees of the Klamath Steamship Company were obliged to be about the work carried on by the receivers in order to receive the lumber as it was delivered by the receivers. The two sets of employees in their work intermingled. The contract of sale provided that the lumber should be placed on the wharf within the reach of the ship's tackle by the seller. When the lumber was delivered and placed in reach of the ship's tackle by the receivers, the duties of the employees of the steamship began, namely, to load the lumber on the ship. The employees of the steamship took up the work where the receivers stopped. In fact, as the cars loaded with lumber were placed on the wharf in reach of the ship's tackle, the servants of the steamship would, by means of the slings and tackle, remove the lumber from the cars into the hold of the ship. The employees of the receivers and the employees of the steamship, including the steamship's employee the decedent, thus met on common ground, and both, by the necessities of their duties, were obliged to work on the wharf, on and about the tracks, and around the machinery where the operations were being carried on.

The only evidence introduced tended to show that deceased was standing on the edge of the wharf in a place where the convenient and proper execution of his duties required him to be, and there is nothing to indicate that he was negligent in any particular, or that any other place would have been safer, consistently with the performance of those duties. In other words, as the employee of the Klamath Steamship Company he was in the place where his duties required him, engaged in the labor of receiving and stowing away, or superintending the receiving and stowing away, of the lumber brought to the edge of defendants' wharf, and in reach of the tackle of the steamship company.

In view of the able and exhaustive analysis of our Employers' Liability Act by Mr. Justice Harris in Turnidge v. Thompson, 89 Or. 637,

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175 Pac. 281, which covers every phase of the question as to the persons who are within or without the act, we deem any attempt at further analysis or distinction unnecessary. From the lucid interpretation in that case and in other cases hereafter mentioned, we deduce the rule that the Employers' Liability Act does not extend to the protection of the general public as such, but that it does extend its protection to employees of the particular person owning or operating dangerous machinery or engaged in hazardous employments, and to other persons or employees of other corporations whose lawful duties require them to be or work about such machinery, or expose themselves to the hazards of the machinery or appliances in use by the owner thereof.

Such, when considered with reference to the case then in hand, was the holding in Clayton v. Enterprise Electric Co., 82 Or. 149, 161 Pac. 411, which, with the limitation given above, is approved in Turnidge v. Thompson, supra. See, also, Morgan v. Bross, 64 Or. 63, 129 Pac. 118; Cauldwell v. Bingham & Shelley Co., 84 Or. 257, 155 Pac. 190, 163 Pac. 827.

From these authorities we conclude that if the other elements authorizing recovery are present the deceased was a member of that class on behalf of which a recovery is authorized by the act.

[2, 3] It is urged that "plaintiff does not allege or prove that the work decedent was engaged in at the time he was injured involved a risk or danger, and therefore she cannot maintain this action." While the complaint is not so definite in this respect as the rules of good pleading would seem to require, yet, taken as a whole, we think it is sufficient. After stating in detail the business the receivers were engaged in, including the operation of railway tracks and machines for transporting the lumber from the mill to the wharf, and stating that such transportation was by means of cars placed upon said tracks and drawn by horses, one paragraph of the complaint states that "such business was a work involving risk and danger to the public."

The paragraphs quoted in the statement give in great detail the manner in which the work of loading was carried on; point out its defects and omissions, and how they might have been remedied or avoided; and the abstract shows no demurrer or objection to the pleading before trial, and the case was tried apparently upon the theory that it was sufficient. Under the circumstances we think the pleading was sufficient. This being the case, the question as to whether the work was hazardous, or in fact involved risk or danger, became a question for the jury. Wolsiffer v. Bechill, 76 Or. 516 146 Pac. 513, 149 Pac. 533; Yovovich v. Falls City Lbr. Co., 76 Or. 585, 149 Pac. 941. There was evidence from which the jury had a right to infer that the work was hazardous, especially in the manner and with the appliances with which it was prosecuted.

[4, 5] The next assignment of error is based upon the failure of the court to grant plaintiff's motion for a nonsuit and directed verdict, and for judgment on the pleadings based upon the assumption that by presenting a claim against the Klamath Steamship Company for indemnity for her husband's death, under what is known as the Workmen's Compensation, Insurance and Safety Act, plaintiff divested herself of any right to bring an action against the defendants under our Employers' Liability Law.

Those sections of the California Act which are supposed to bear upon this contention are found in chapter 176 of the statutes of California for 1913, as amended by chapters 541, 607, and 662, Laws of 1915, and are as follows:

"Sec. 12. (a) Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against an employer for any personal injury

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sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death in those cases where the following conditions of compensation concur."

"Sec. 73. (a) All proceedings for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto, or for the enforcement against the employer or an insurance carrier of any liability for compensation imposed upon him by this act in favor of the injured employee, his dependents or any third person, or for the determination of any question as to the distribution of compensation among dependents or other persons or for the determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any benefit under the compensation provisions of this Act, or for obtaining any order which by this act the commission is authorized to make, shall be instituted before the commission, and not elsewhere, except as otherwise in this act provided, and the commission is hereby vested with full power, authority and jurisdiction to try and finally determine all such matters, subject only to the review by the courts in this act specified and in the manner and within the time in this act provided."

"75a. The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

"Sec. 31. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee, shall operate as an assignment to the employer of any right to recover damages which the injured employee, or his personal representative, or any other person, may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents is entitled shall not be admissible in evidence in any action brought to recover damages, but any amount collected by the employer, under the provisions of this section, in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employee or other person entitled."

Whether or not the legislative authority of the state of California extends to providing for compensation for an injury inflicted by one citizen of that state upon another citizen, even when the injury occurs outside the territorial limits of the state, need not be discussed or questioned. Neither is it necessary to discuss the effect of such an assignment or subrogation by operation of law, as is provided for in the section last quoted, where the cause of action to which the subrogation is intended to apply arose or is suable in the state.

But in this case a different question arises. The accident and death occurred in this state, and the defendants are receivers of a corporation located in this state. As a corporation resident in this state is suable here only, they are in fact sued here. In this state a right of action for tort is not assignable. Plaintiff, who was a resident of California, could not have gone to California and made an assignment of an interest in her claim for damages against defendnts to a resident of that state, or to the Klamath Steamship Company, which could have authorized it to bring an action in our courts to recover damages for the death of Captain Rorvik. Such an action would be contrary to the policy of our laws and against the decisions of our courts. While courts, as a matter of

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comity, will usually enforce a right arising out of a statute of another state, they will not do so where the statute infringes upon the law of the forum. 5 R. C. L. § 8, and cases there cited.

It is conceded that the statute of California can give the Klamath Steamship Company no higher or greater right than it could have obtained by private contract with plaintiff, and that could never have gone to the extent of authorizing it to sue in its own name in our courts on account of a tort committed to the damage of plaintiff. It may also be noticed that plaintiff is not divested by the California statute of all interest in her claim, but the employer is only allowed to retain an amount sufficient to reimburse itself for the amount which it has paid, or is liable to pay, as compensation, and is required to pay the overplus, if any, to plaintiff.

[6] The California act does not profess to make full compensation for the injury, but limits the amount to be allowed to the sum of $5,000. Between the employer and employee this sum is the limit of the recovery, but this fact does not bar a recovery against the actual wrongdoer to the full extent of the injury suffered. With such an interest in the case we are of the opinion that plaintiff would, in any event, be entitled to sue in her own name in our courts in case the Klamath Steamship Company should fail to do so, even if we gave, which we do not, full effect to the subrogation provided for by the California statute.

The views above expressed render unnecessary any discussion as to the sufficiency of the supplemental complaint filed by plaintiff, or the validity of the evidence offered in support of it. Neither is it necessary to discuss the validity of plaintiff's claim against the Klamath Steamship Company beyond saying that, in vew of the decision of the Supreme Court of the United States in the case of S. P. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, it seems clear that the Industrial Accident Commission of California had no jurisdiction to entertain plaintiff's claim against the steamship company, and that if that company has failed to prosecute an appeal to the Supreme Court of the United States, or has lost that privilege by sleeping upon its rights, it has been guilty of such laches as would probably preclude it from recovering from these defendants.

Since the original draft of this opinion was prepared we have received the advance sheets containing the opinion of the United States Supreme Court in the case of Knickerbocker Ice Co., Plaintiff in Error, v. Lillian E. Stewart, Defendant, 252 U. S. ——, 40 Sup. Ct. 438, 64 L. Ed. ——, decided May 17, 1920, in which it is held that even Congress cannot constitutionally authorize a state industrial accident commission to take cognizance of marine torts; thus settling the question in accordance with the views above expressed.

[7] It may be added that there is no evidence that there has ever been any remittitur from the Supreme Court of California to the lower court in the matter, or any proceeding taken which establishes the decision of the California Supreme Court as a final judgment so as to bring it within the "full faith and credit" clause of the Constitution.

In any case these defendants are not liable to be harassed by another action after the present suit is disposed of. Beyond that contingency it is a matter of no consequence to defendants whether the action is brought by plaintiff or by the steamship company.

It will be noticed that the alleged award by the California Industrial Accident Commission is not pleaded by way of mitigation or reduction of damages, but as a bar to this action. As such it is ineffective. Defendants' motions for abatement, nonsuit, and directed verdict were, therefore, properly overruled.

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[8] Defendants except to the giving of the following instruction:

"If you find from a preponderance of the evidence that the work that the receiver was doing was one involving a risk or danger to the public and that the decedent was a member of the public and rightfully upon the premises where and when he was injured, and that the receiver failed to use any one or more of such devices, care, and precaution which it was practicable to use for the protection and safety of life and limb, and that such failure was in one or more of the particulars as alleged by the plaintiff, and that by the use thereof the efficiency of the structure, machine, or other apparatus or device said receiver was using would have been preserved, and that by reason of such failure, the same being the proximate cause of the accident, that the decedent received the injuries which caused his death, in that event the plaintiff would be entitled to recover."

The argument in support of appellants' contention is stated as follows:

"Whatever duty the defendants owed Captain Rorvik was not a duty they owed to him as a member of the public. Captain Rorvik docked the steamship Klamath at our dock for the purpose of loading it with lumber we had sold to be loaded on that steamship, and thereby there arose certain legal duties that the defendant owed to the deceased, but all those legal duties were and are well defined by laws other than the duties laid down by our Employers' Liability Act. The act did not add to or take away any of these duties.

"By this instruction the jury were told that the plaintiff could recover if decedent was a member of the public as such, and if the work the receiver was doing was one involving a risk or danger to the public as such, if the decedent was rightfully upon the premises, etc. The vice of this instruction lies in the fact that the Employers' Liability Act does not embrace the public as such, and the instruction states that it does."

The argument proceeds upon the theory that this action is based upon the proposition that deceased was a mere member of the public without any duties which required his presence at the place where he was injured, and in contiguity to the machinery and apparatus employed in loading the vessel, whereas the complaint, taken as a whole, and the uncontradicted testimony, show that deceased was necessarily in the position he occupied and engaged with defendants' employees in loading the vessel. It is true that the duties of the deceased and the employees of the steamship company began where the actual physical labor of defendants' employees left off, but no link in the chain was broken; the loading was a continuous work, and could not be otherwise; the lumber was put upon the slings extending from the vessel by defendants' employees, and from that position moved aboard by machinery operated by the employees of the steamship company. The vessel could not be loaded in any other manner, and while deceased was in one sense a "member of the public," in another he was an employee engaged in working about or in the vicinity of machinery found by the jury to be dangerous, which brings the case squarely within the rule announced in Clayton v. Enterprise Electric Co., supra.

If there existed a controversy as to the surroundings or the reason for the decedent's presence on the wharf, or his relation to the subject-matter, the instruction objected to might have had a tendency to mislead the jury; but, in view of the evidence actually given, it tended to narrow, rather than to extend, the limit of defendant's liability.

In a subsequent instruction Judge Tucker explained what he meant by the term, "a member of the public," in the following language:

"In this connection I instruct you that if you find the decedent, at the time he received the alleged injuries, was upon the wharf of the North

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Pacific Lumber Company, defendant, and was in charge of the loading of the Steamship Klamath, either upon the express or implied invitation of the receiver, and that as captain of the said steamship his duties in respect thereto required that he be upon the wharf, that in that event he was a member of the public, and as such was entitled to whatever protection the law provides for the public. Or if you find that the decedent was in charge of the loading of the vessel, and that the vessel was being loaded at the said wharf at the express or implied invitation of the receiver, that by reason thereof the decedent was entitled to go upon the wharf if it was reasonably necessary for him so to do in order to superintend the loading of the vessel, and while upon the wharf under such conditions he was a member of the public, he was, as a matter of law, rightfully upon the wharf.

The defendants in their answer claim, in effect, that it was not necessary for the decedent, the captain of the ship, in the discharge of any of his duties at the time he was hurt, to stand in front of the pile of lumber which was piled close to the edge of his dock, and that he received the injuries that resulted in his death from his own carelessness and negligence in standing in this narrow place. And if you believe, gentlemen of the jury, from a preponderance of the evidence in this case, that the duties of the captain did not require him to stand in this narrow place, and you further find that it was carelessness and negligence on his part to stand in this place when there were other places upon the dock that he could have stood with safety, and you believe from a preponderance of the evidence that he sustained his injury, that resulted in his death, because of his own carelessness and negligence, and there was not any negligence on the part of the defendants contributing to the injury, then your verdict should be in favor of the defendants."

In view of this explanation the instruction objected to was not misleading, any tendency in that direction being obviated by the clear explanation given in the succeednig part of the charge last above quoted, which is fairly within the rule announced in Clayton v. Enterprise Electric Co., supra.

Several other objections to instructions are specfied, but they all find their basis in the theory of the nonapplicability of the workmen's compensation law to the circumstances of the case at bar, or to the ruling of the court as to the effect of the claim and award under the provisions of the California Compensation Act. If the writer is wrong in his views as to the force and effect of either of these, then the court below was wrong, and this opinion is not the law. As we view the law, the objections are not well taken.

[9] The last objection is to an instruction upon the measure of damages, which is as follows:

"If you find a preponderance of the evidence that the plaintiff is entitled to recover in this case, it will then become your duty to consider and assess her damages. In determining the amount of the damages, you are instructed that if she is entitled to recover she is entitled to damages equal to the pecuniary loss resulting to her from the death of her husband. The value of the decedent's life is the net amount which the decedent would have saved from his earnings by his skill and bodily labor in his calling during the residue of his life, had he survived, taking into consideration, from the evidence submitted, his age, health, ability, habits of industry and sobriety, and mental and physical skill so far as they affect his capacity for earning money by rendering service to others or accumulating property. All this must depend upon the evidence that has been produced before you on that subject. The amount of damages, however, shall not exceed that asked for in the complaint."

We see nothing wrong in this instruction. The plaintiff was decedent's wife and only heir. Her damages would be an amount equal to

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the pecuniary loss resulting to her from the death of her husband, and that amount would be such a sum as he probably would have accumulated if he had been permitted to live to the limit of his life expectancy. There is no absolute method of computnig the damages in a case of this kind. It would be within the bounds of speculation to imagine that in spite of health conditions and habits, both shown to have been good, there was a possibility that he might die sooner than the life expectancy tables indicate, by some accident on land or sea and incident to his profession, or that his accumulations might be swept away by bad investments, leaving him to die a pauper, or any of many possible contingencies. The rule adopted by the court was one more likely to work out justly in practice than any other that can be formulated, and is sanctioned by authority. McClaugherty v. Rogue River Electric Co., 73 Or. 135, 140 Pac. 64, 144 Pac. 569.

This has been an exceedingly interesting and difficult case. The facts are scarcely contested, but the questions of law involved are intricate, and their examination has consumed much time and labor; but, after a thorough consideration of them, we feel assured that no mistake has been made to the prejudice of defendants, and the judgment of the lower court will therefore be affirmed.

John, J., concurs.

Bean and Bennett, JJ., concur in result.

HARTFORD ACCIDENT & INDEMNITY CO. v. DURHAM.
(No. 1643.)

(Court of Civil Appeals of Texas. Amarillo. April 21, 1920. On motion for Rehearing, May 19, 1920.)

222 Southwestern Reporter, 275.

1. MASTER AND SERVANT — AUTOMOBILE TRUCK HELPER HELD KILLED IN COURSE OF EMPLOYMENT.

Where furniture driver, after having delivered furniture to nearby town, instead of immediately returning, proceeded to another city, where he became intoxicated, a helper on the truck who was under the control of the driver, and who was killed on return trip, was killed in the course of his employment, since, upon driver's failure to immediately return, he was not required to abandon the truck and seek other conveyance back to home town.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

2. MASTER AND SERVANT — EMPLOYER HAS BURDEN OF PROVING INTOXICATION AS DEFENSE.

In an action under Employers' Liability Act, where intoxication of employee is pleaded as a defense under Vernon's Ann. Civ. St. Supp. 1918, art. 5246—1, defendant has burden of affirmatively establishig such intoxication.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT—INTOXICATION, TO CONSTITUTE DEFENSE UNDER EMPLOYERS' LIABILITY ACT, MUST HAVE CONTRIBUTED TO ACCIDENT OR DISABILITY.

Intoxication, to be available as a defense under Vernon's Ann. Civ. St. Supp. 1918, art. 5246—1, in action under Employers' Liability Act,

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must have contributed to the happening of the accident or the disability resulting therefrom.

(For other cases, see Master and Servant, Dec. Dig. § 381.)

4. MASTER AND SERVANT — INTOXICATION OF EMPLOYEE HELD NOT PROXIMATE CAUSE OF ACCIDENT.

That employee killed when truck in which he was riding overturned as result of driver's negligence was intoxicated would be no defense in action for h's death under Employers' Liability Act, where no act of employee contributed to injury, causing death; such intoxication not being the proximate cause.

(For other cases, see Master and Servant, Dec. Dig. § 381.)

5. MASTER AND SERVANT — METHOD OF CALCULATING COMPENSATION FOR DEATH HELD NOT GROUND FOR COMPLAINT.

In action for death of employee under Employers' Liability Act, defendant could not complain, on appeal, of court's failure to calculate the compensation due exactly as required by the statute, under Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—14, 5246—82, where amount allowed was less than it would have been if statute had been strictly followed.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

6. MASTER AND SERVANT — LUMP SUM HELD PROPERLY AWARDED FOR EMPLOYEE'S DEATH.

In action for death of employee under Employers' Liability Act, *held*, under the facts, that court properly awarded a lump sum rather than a weekly allowance.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by Sophronia Durham against the Hartford Accident & Indemnity Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. J. Eckford, of Dallas, for appellant.

W. R. Simmons, of Freemansburg, W. Va., and Parks & Hall, of Dallas, for appellee.

HALL, J. This suit arose under the Employers' Liability Act (Acts 1913, c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h–5246zzzz]), and was instituted by appellee, the widow of George Durham, deceased, against the Hartford Accident & Indemnity Company, the Haverty Furniture Company, and the Texas Employers' Insurance Association. At the time of the trial appellee dismissed her cause of action as to the last-named defendants, proceeding against the appellant alone. It was shown that Geo. Durham was injured December 22, 1917, and that death resulted from said injuries on December 26th following. Appellee filed her claim with the Industrial Accident Board of Texas, which on April 26, 1918, rendered judgment for her against appellant in the sum of $9.52, for 360 weeks, being 60 per cent. of a weekly wage of $15.87. The Accident Board refused to render judgment for a lump sum. Both parties filed objections to the award of the Accident Board, and the case was transferred to the district court of Dallas county.

Appellant's defense is, in substance, that George Durham did not sustain the injuries which produced his death while in the course of his employment, in that he, together with one Fred Meyers, a fellow employee of the Haverty Furniture Company, were sent by said Company from its

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place of business in the city of Dallas with an automobile truck loaded with furniture to be delivered to a customer at Arlington, a town situated in Tarrant county, about 16 miles west of the city of Dallas, and midway between Dallas and Ft. Worth; that, contrary to the rules and regulations of said furniture company, prohibiting employees from drinking intoxicating liquors while on duty, and while in the course of their employment, the said George Durham and Fred Meyers, after delivering said furniture at Arlington, went in said truck to the city of Ft. Worth, where intoxicating liquor was purchased and drunk by both of them; that said Meyers became irresponsibly intoxicated, and in said condition undertook to drive said truck from Ft. Worth to Dallas, and while in such condition the truck was overturned by negligence of Meyers, which produced the injuries directly and proximately causing Durham's death. that the said Durham accepted intoxicating liquor from Meyers, drank the same, acquiesced in, consented to, and participated in the said acts of said Meyers in going to Ft. Worth and not returning to Dallas from Arlington, and by reason of their skylarking and other acts stated, and by reason of violating the instructions and rules of their employer while outside the course of their employment, and at the time of the injuries, neither the said Durham nor the said Meyers were acting in the course of their employment; that said injuries which caused the death of Durham occurred while the said Durham was in a state of intoxication.

The court submitted to the jury only two issues, the first being:

"What was the average weekly wage of George Durham for the year immediately preceding his death?"

The jury answered: "$16.50."

The second question is:

"Would a failure of the defendant to make a lump sum settlement with the plaintiff of the compensation due her on account of the death of her husband work manifest hardship and injustice to her?"

This was answered in the affirmative.

Appellant requested first a peremptory instruction, which was refused. Whereupon it requested two special issues, as follows:

"(1) Were the injuries sustained by George Durham in the course of his employment?

"(2) Did George Durham sustain his injuries while in a state of intoxication?"

The refusal to submit these special issues is made the ground of several assignments of error. The evidence shows that the deceased, George Durham, was a negro about 33 years of age; that he had been working for the Haverty Furniture Company, in their furniture store in the city of Dallas, for several years, performing any and all duties required of him and which he was capacitated to perform. James L. Hogg, the shipping clerk for the furniture company, testified that his employer had sold some furniture to a customer at Arlington; that he had ordered Meyers, as the truck driver, and George Durham, to load the furniture on a truck and deliver it to the customer at Arlington, to obtain the customer's receipt for the shipment, and return to Dallas; that they were not authorized to go on to Ft. Worth, beyond Arlington. He further testified that Durham was not the driver of the truck; that Meyers had charge of it, and Durham was wholly a helper and under the direction of Meyers while on the trip. The uncontradicted evidence shows that the delivery was made; that Durham had nothing whatever to do with handling or driving the truck. Meyers testified that after delivering the furniture at Arlington he went on to Ft. Worth to get some whisky for Christmas; that he did not say anything to anybody about going over there, and that Durham did not know he was going until witness told him

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at Arlington; that Durham said nothing but just went along. The accident occurred on the return trip after the truck had passed Arlington en route to Dallas. On direct examination Meyers testified with reference to the issue of intoxication as follows:

"While in Ft. Worth I drank two or three glasses of beer. George Durham only took one glass of beer. that is all he took to my certain knowledge; if he drank any more, I know nothing of it. He was on the truck, and we just got off and went into the saloon. * * * I was drinking at the time. George Durham didn't have anything whatever to do with the driving of that truck at any time on that trip. He had nothing whatever to do with my going to Arlington, thence to Ft. Worth, and returning to Dallas by way of Arlington and Grand Prairie. George Durham was sober at the time of the accident and at all times on the trip."

On cross-examination upon this issue he testified:

"On the way back I opened a half pint of whisky and drank some and gave George a drink. I didn't give the half pint to him. I bought about 11 or 12 pints of whisky at Ft. Worth, and all of them were in the truck when we started on the return trip. I only took one drink of whisky after leaving Ft. Worth. George didn't drink over two or three glasses of beer at Ft. Worth. * * * George didn't buy any whisky. * * * The barkeeper made me a present of half a pint. While I was in the saloon the truck was standing out at the front. I didn't stand there and watch it, but when I went in George was on the seat. I got a glass of beer for him when I drove up, and he got out and went in and drank it, and when I came out he was sitting up there on the truck waiting for me. I was in the saloon about 30 minutes or an hour, perhaps."

The appellee testified that she saw her husband at the sanitarium in Dallas after his return and asked him how the accident happened, that he had not received any medical attention at that time, and her testimony is:

"He was not drunk at the time. He talked with just as good sense as I do, and I asked him if he was drunk, and he told me that he was not, and I know he was not, because he talked with too good sense to be drunk. I never knew him to be drunk while I knew him. * * * I Never saw him drunk in my life."

Article 5246—1, Vernon's Sayles' Civil Statutes, provides that, in an action to recover for the death of an employee resulting from personal injuries sustained in the course of his employment, it shall not be a defense: (1) That the employee was guilty of contributory negligence; (2) that the injury was caused by the negligence of a fellow employee; (3) but said article further provides that the employer may defend upon the ground that the injury was caused while the employee was in a state of intoxication.

[1] Under this record we are of the opinion that the injuries were sustained by George Durham in the course of his employment. He was under the direction and control of Meyers, the driver of the truck. While he entered no protest when he learned that Meyers intended to go to Ft. Worth, it does not appear that any objection of his would have been considered. He was not required to abandon the truck and seek other means of conveyance back to Dallas. He had the right to return to Dallas in the conveyance provided by his employer, and had no authority to demand that Meyers, who had been placed in control of the truck, and was temporarily in authority over him, should abandon the trip to Ft. Worth and return direct to Dallas from Arlington.

[2-4] Where intoxication is pleaded as a defense, the burden of proof rests upon the defendant to affirmatively establish the fact of such intoxication. 1 Honnold on Workmen's Compensation, § 142, p. 567. "To

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be available as a defense, intoxication must contribute to the happening of the accident or the disability resulting therefrom." Id. If it be admitted that the evidence quoted above is sufficient to require the submission of the issue to the jury, yet, under the circumstances, an affirmative finding upon that issue would not exonerate appellant. The injury did not result from any act of the deceased. He was not driving the truck, did not fall from the seat and was not injured until the truck overturned as the result of the negligence of his fellow employee, Meyers. Under these circumstances his intoxication could not be the proximate cause of the injury if the fact had been established. We conclude the court did not err in refusing the requested instructions.

[5] Upon the jury's findings the court rendered judgment in favor of appellee for the sum of $3,353.13. The judgment recites in part:

"It appearing to the court from the undisputed evidence in the case, coupled with the fiindings of the jury, that the average weekly wages of plaintiff's husband, George Durham, for the last year immediately preceding his death, was the sum of $16.50 per week, and that plaintiff therefore is entitled to compensation at the rate of $9.90 per week for 360 weeks, beginning the 22d day of December, 1917, which would total the sum of $3,564, and at the date of this judgment the sum of $514.80, being 52 weekly payments at $9.90 per week, commencing December 22, 1917, to December 22, 1918, is due and unpaid, and the court finds that a discount of $210.87 should be taken from the total amount of $3,564, and the remainder, $3,353,13, should be awarded to plaintiff as a lump sum settlement in this case; that the court, in arriving at such discount, takes into consideration the fact of the unpaid 52 weekly payments for the year commencing December 22, 1917, to date of trial, for which plaintiff has received no benefit or interest thereon, and the court offsets the discount or interest on a like amount of $514.80 due the plaintiff for the succeeding year; that is, from December 22, 1918, to December 22, 1919. Allowing the defendant no discount on said sum for its payment now, the failure to pay the compensation for the preceding year being offset by payment now of compensation for the succeeding year, and then upon the balance of $2,534.40 due during the remainder of the 360 weeks, the court allows a discount on the basis of 5 per cent. for payment now in a lump sum the sum of $210.87, leaving a balance after the discount of $2,323.53, which, after adding the sum of $1,029.60, makes a total lump sum now due plaintiff of $3,353.13, which amount the court finds to be a reasonable and proper lump sum settlement to which plaintiff is entitled, under all the facts of the case,, of her total claim for compensation at the rate of $9.90 per week for 360 weeks commencing December 22, 1917."

V. S. C. S. 1918 Supp. art. 5246-14, provides that, if death should result from the injury, the association shall pay the beneficiary a weekly payment equal to 60 per cent. of his average weekly wages, not more than $15, nor less than $5 a week, for a period of 360 weeks, from the date of the injury." Article 5246—82, Id., in defining the term "average weekly wages," says the same shall mean:

"1. If injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same employer or not, substantially the whole of the year immediately preceding the injury, his average annual wages shall consist of 300 times the average daily wage or salary which he shall have earned in such employment during the days when so employed. * * * 5. The average weekly wages of an employee shall be one-fifty-second part of the average annual wages."

While the court has not made the calculation exactly as we think the statute required, and by calculation shown to have been made by the recital in the judgment the court arrives at a sum less than our figures show should have been awarded, appellant's assignment complaining of the

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amount allowed will be overruled. The testimony is sufficient to support the jury's finding that the deceased was receiving a weekly wage of $16.50 for the year preceding September 1st. The manager of the Haverty Company testified that the deceased had threatened to quit work on September 1st and pick cotton during the fall, and in order to induce him to remain until the end of the calendar year had promised him a bonus of $2.50 per week, which the company intended to pay at the end of the year. This would have entitled the deceased to a weekly wage of $19 beginning September 1st, or approximately for a period of 16 weeks up to the time of the injury. Allowing the deceased $19 for 16 weeks and $16.50 for 36 weeks would have averaged a fraction over $17.20 per week. Sixty per cent. of this for the time allowed, less the deductions made by the court, amounted to more than the total sum decreed to appellee.

[6] The remaining contention to be disposed of is that there is no evidence which authorized the court to render judgment for a lump sum rather than for a weekly allowance. It was shown by undisputed testimony that at the time of George Durham's death he had purchased some lots, upon which he was making periodical payments; that he owed grocery bills, clothing bills, and other amounts; that after his death his wife was in bad health and was forced to support herself, her widowed mother, who was 55 years of age, and her grandmother, 89 years of age, and earn her living by cooking; that in addition to these expenses she was forced to pay out of her wages as a cook her house rent; that she was without means to pay her debts, and after the death of her husband had lost one of her lots by her inability to make the periodical payments of purchase money. that something more than $200 was still due on the two lots left to her. She testified that as soon as she could get the money she intended to build her a house on one of the lots, and thereby save her a house rent. We think this evidence is sufficient to warrant the court in granting her a recovery in a lump sum. Texas Employers' Insurance Association v. Downing, 218 S. W. 112.

Finding no reversible error in the judgment, it is affirmed.

On Motion for Rehearing.

Appellant's motion for rehearing presents no new matter and no additional authorities. After reviewing the contentions urged in the brief, we see no reason for otherwise disposing of the issues. The motion is therefore overruled.

Appellant also files a request for additional findings of fact which is granted. We find that the rules of the Haverty Furniture Company prohibited the drinking of intoxicating liquors by its employees while on duty. We further find that George Durham did drink intoxicating liquors while at Ft. Worth.

TEXAS EMPLOYERS' INS. ASS'N v. ROACH ET UX. (No. 142-3073.)

(Commission of Appeals of Texas, Section A. May 26, 1920)

222 Southwestern Reporter 159.

MASTER AND SERVANT—RIGHT TO SUE ON CLAIM UNDER COMPENSATION ACT DOES NOT DEPEND ON NOTICE OF INTENT TO ABIDE BY AWARD.

Under workmen's Compensation Act (Vermon's Sayles' Ann. Civ. St. 1914, art. 5246q), right to sue, or to require suit to be brought on a claim for compensation, is not dependent on a party, before final determi-

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nation by the Industrial Accident Board, giving notice that he does not consent to abide thereby; but the board's decision is not conclusive, though the parties agree to submit the matters pertaining to the injury to it, and the right to sue or require suit is by way of appeal.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by T. W. Roach and wife against the Texas Employers' Insurance Association and another. Judgment for defendants was reversed as to the named defendant, by the Court of Civil Appeals (195 S. W. 328), and said defendant brings error. Reversed and remanded.

Lawther, Pope & Mays, of Dallas, for plaintiff in error.

R. D. Allen, of Sulphur Springs, for defendants in error.

TAYLOR, J. T. W. Roach and wife, defendants in error, filed this suit against the Texas Employers' Insurance Association, plaintiff in error, for compensation under the Employers' Liability Act of 1913 (Laws 1913, c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts 5246h-5246zzzz]), claimed to have accrued to them by reason of the death of their minor son. The son's death was alleged to have resulted from injuries received while in the course of his employment as an emloyee of the Gulf Pipe Line Company, a subscriber to the insurance association.

Prior to filing suit, defendants in error filed their claim for compensation with the Industrial Accident Board as provided by the Liability Act. Plaintiff in error and the Gulf Pipe Line Company, outside of and independent of the act, agreed with defendants in error to submit all matters pertaining to the injuries of the deceased to the Industrial Accident Board. Upon a hearing before the board, and by its final ruling and decision, defendants in error, as beneficiaries of their son, secured an award of $5 per week for a period of 360 weeks, against plaintiff in error.

The main object of this suit (so stated to be by defendants in error) was the enforcement of the award by "mandamus, mandatory injunction, or weekly executions, as the court might determine.,; the allegation relied upon as warranting its enforcement being that the award is res judicata between defendants in error and the insurance association.

Defendants in error pleaded in the alternative that, if it should be held that they were not entitled to the enforcement of the award, they should recover judgment against plaintiff in error on the facts in accordance with the terms of the Liability Act. Defendants in error joined the Pipe Line Company as a party defendant, and further pleaded in the alternative against it for damages under the statutes and common law.

A general demurrer on behalf of the Pipe Line Company was sustained. Plaintiff in error's demurrer to the allegations that the award of the Industrial Accident Board was res judicata was also sustained. The case was tried upon that count of the petition, seeking a recovery of compensation on the facts under the Liability Act.

The court submitted to the jury only two issues, to wit: (1) Whether plaintiff in error's son was injured while in the employment of the Gulf Pipe Line Company; and (2) whether the son's death was caused by injuries so received. The jury found upon the first issue that the son was injured while in the employ of the company, but found upon the second that his death was not due to the injuries received. Judgment was rendered upon the findings in favor of both the Pipe Line Company and plaintiff in error.

The Court of Civil Appeals held that the trial court did not err in sustaining the demurrer as to the alleged cause of action against the Pipe Line Company, and as to it affirmed the judgment, but further held that the trial court was in error in sustaining the demurrer to that count of the

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petition alleging that the award of the Industrial Accident Board was res judicata between the insurance association and defendants in error. 195 S. W. 328.

Writ of error was granted upon application of the association referred to the committee of judges. Two grounds of error are alleged in the application. The first relates to the holding of the Court of Civil Appeals on the question of res judicata, and the second to the question of whether the trial court had jurisdiction to try the case.

The case turns upon the construction of section. 5, pt. 2, of the Employers' Liability Act, incorporated into Vernon's Sayles' Civil Statutes as article 5246q, which is as follows:

"All questions arising under this act, if not settled by agreement of the parties interested therein, shall, except as otherwise herein provided, be determined by the Industrial Accident Board. Any interested party who is not willing, and does not consent to abide by the final decision of said board on any disputed claim may sue on such claim or may require suit to be brought thereon in some court of competent jurisdiction, and the board shall proceed no further toward the adjustment of such claim; provided, however, that whenever any such suit is brought, the rights and liabilities of the parties thereto shall be determined by the provisions of this act, and the suit of the injured employee, or persons suing on account of the death of such employee, shall be against the association, if the employer of such injured or deceased employee is at the time of such injury or death a subscriber, as defined in this act, in which case the recovery shall not excesd the maximum compensation allowed under the provisions of this act, and the court shall determine the issues in such cause instead of said board."

The Court of Civil Appeals in this case, as well as in Fidelity & Casualty Co. v. House, 191 S. W. 155, construe the article quoted as providing that the parties at interest may have either the courts or the Industrial Accident Board determine the merits of the claim for compensation made under the act, and that when the claim is filed, unless one of the interested parties, prior to the final decision of the board, gives notice to the adverse party that he does not consent to abide thereby, he shall not be entitled to sue or require suit to be brought on the claim. In other words, that under the terms of the article quoted, the right to sue or require suit to be brought in the courts upon any disputed claim is not one by way of appeal from the final ruling of the board, but is in the nature of an option, extended to any interested party, either to have the questions arising under the act determined by the board or have them litigated in the courts. This holding is followed in Southwestern Sur. Ins. Co. v. Curtis et al., 220 S. W. 1162, and in Gen. Acc. Fire & Life Assur. Corp. v. Evans, 201 S. W. 705.

The Court of Civil Appeals in this case say:

"When the parties at interest in the claim made under the act consent for the Industrial Accident Board to take proceedings under the act and finally determine the claim for compensation under the act, and do not withdraw consent before there has been final ruling and decision by the said board upon such claim, then in virtue of the exercise by the parties of their option, the decision of said board upon the said claim is, by the terms of the act, final."

We cannot concur in this conclusion of the court. By the provisions of the Employers' Liability Act, every employer within its terms is required to keep a record of all injuries received by his employees in the course of their employment, and to make a report thereof to the Industrial Accident Board within eight days after its occurrence. Vernon's Sayles' Civ. Stat., art. 5246qqq. The board is authorized to make rules for

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carrying out and enforcing the provisions of the act, and authority is conferred upon the board to require injured claimants to submit themselves before it, or some one acting under its authority, for examination. Summary process and procedure is authorized; and the board is given power to subpœna witnesses, administer oaths, and to perform those acts necessary to a determination of all questions preliminary to the making of final rulings and decisions on disputed claims. Thus an administrative agency is created for carrying out the provisions of this act. Id. 5246pp. The decision of the agency, or board, is not conclusive, nor does the fact that the parties agree to submit the matters pertaining to injuries of the claimant to the board estop them resorting to the courts. Under the express provisions of the article quoted, if the claimant "is not willing and does not consent to abide by the final ruling and decision of the board," he may sue on the claim; or if the association is not willing to abide by the decision, it may require suit to be brought.

The Court of Civil Appeals, in the House Case supra, says:

"The right 'to sue on such claim' in the courts was intended to be made dependent upon the want of consent or objection of either party to the board's further acting and making 'final ruling and decision' being made or entered before the board in the first instance, *before the final ruling and decision is made.*" (Italics ours.)

There is no express provision in the act to this effect, nor is there in the language of the act any clear implication that the right to sue, or require suit to be brought, is dependent upon the interested party's giving notice prior to the rendering of a final decision of whether he will abide by it. In the absence of both such provision and implication there is no warrant for such limitation wth respect to the right of suit.

Whether the right to require suit upon disputed claims was, under the 1913 act, in the nature of an option to be exercised prior to the final decision by the board, or was to be exercised by way of appeal from such decision, is, in our opinion, not an open question.

Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S. W. 559, states in clear and concise terms the purpose, operation, and effect of the act. The following excerpts from the opinion make clear that in the view of the court it is not necessary as a prerequisite to suit under the act, that the interested party shall give notice in limine that he is unwilling to abide by the final decision of the board:

"There is also created by the act and charged with its administration, a board of three members, whose duties are defined. In general, its province is the determination of disputed claims arising under the act. If its decision is not accepted, suit may be brought upon the claim, or be required to be brought, against the association if the employer of the injured or deceased employee was a subscriber at the time of his injury or death, in a court of competent jurisdiction, which, however, shall adjudicate the questions of liability and compensation according to the provisions of the act. * * *

"Nor does the act impair the right of trial by jury. Trial by jury cannot be claimed in an inquiry that is nonjudicial in its character, or with respect to proceedings before an administrative board. The Accident Board charged with the administration of the act is, as we have said, not a court. In its determination of disputed claims there could be no right to a jury trial. The act authorizes appeals from the decisions of the board to the courts, where a jury trial of the matters in dispute, under the law as embodied in the act, may be had. * * *"

The view that the act requires notice in limine as a prerequisite to suit is inconsistent with that of the Supreme Court as to its purpose and operation. The right to sue is by way of an appeal, and until final deci-

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sion is rendered by the board there is nothing from which an appeal can be prosecuted.

Following the decision in the Middleton Case, supra, the Thirty-Fifth Legislature (Vernon's Sayles' Civ. Stats. 1918 Supp. vol. 2, arts. 5264-5244) amended section 5 of the 1913 act above quoted so as to provide that any interested party who does not consent to abide by the final decision of the board shall, within 20 days after the rendition of such decision, give notice to the adverse party and to the board that he will not abide by the ruling, etc., and used the same language in the amendment with respect to the consent of the parties as was used in the amended act.

The trial court was not in error in holding that the award made by the Industrial Accident Board was not res judicata between the parties, and the judgment of the Court of Civil Appeals should, in our opinion, be reversed.

The remaining assignment of error grows out of the suggestion in the opinion of the Court of Civil Appeals that, inasmuch as defendants in error were not entitled to recover the compensation sued for in a "lump sum," the trial court may not have had jurisdiction to try the case. The suggestion was made under the view that defendants in error were entitled to recover on that count of the petition under which they sought to enforce the award of the Industrial Accident Board, and that the amount thereof alleged to be due at the rate of $5 per week was less than $500.

In that count of the petition upon which the case was tried, defendants in error alleged that compensation had accrued for a period of more than 50 weeks at the rate of $15 per week the total sum alleged to be due being an amount within the court's jurisdiction. It is therefore unnecessary, in view of our holding that the award of the board was not res judicata, to determine the question raised by the second assignment of error

Defendants in error in their brief filed in the Court of Civil Appeals present as their fifth assignment of error that the findings and verdict of the jury are contrary to the great preponderance of the evidence. Inasmuch as this and other assignments relating to the trial of the case on the facts were not passed upon by the Court of Civil Appeals, we recommend that the cause be remanded to that court for such action as may be deemed proper following its disposition of the assignments referred to

PHILLIPS, C. J. We approve the judgment recommended in this case, and the holding of the Commission on the question discussed.

STATE ROAD COMMISSION v. INDUSTRIAL COMMISSION OF UTAH. (No. 2476.)

(Supreme Court of Utah. May 18, 1920.)

190 Pacific Reporter 544.

1. MASTER AND SERVANT—COMPENSATION CLAIMANT'S EVIDENCE HELD TO SHOW EMPLOYEE KILLED BY LIGHTNING WAS SEEKING SHELTER.

In a proceeding under Workmen's Compensation Act for compensation for death of an employee struck by lightning after having left a

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state road on which he worked, evidence *held* to justify finding that he was seeking shelter from a storm when killed.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—EMPLOYEE STRUCK BY LIGHTNING WHILE SEEKING SHELTER FROM STORM WAS INJURED IN "COURSE OF EMPLOYMENT."

Where an employee working on a state road left the road to seek shelter from a storm, and was killed by lightning before reaching the shelter, his death was the result of an accident occurring in the course of his employment, within Comp. Laws, 1917, §§ 3112, 3113, as amended by Sess. Laws 1919, c. 63.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

3. MASTER AND SERVANT—"AVERAGE WEEKLY WAGE" WITHIN COMPENSATION ACT DEFINED.

Under Workmen's Compensation Act (Comp. Laws 1917, § 3132), requiring benefits to be based on the "average weekly wage" at time of injury, the average weekly wage, where the employment is continuous, may be computed by multiplying the average daily wage by 300 and dividing by 52; but, where the employment is intermittent, the average weekly wage is determined by dividing the aggregate amount earned by the number of weeks, including the weeks in which no work was done. Uintah Power & Light Co. v. Industrial Commission of Utah, 189 Pac. 875.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Proceedings under Workmen's Compensation Act for compensation for death of J. C. Johnson, opposed by the State Road Commission, employer. Award for claimant by the Industrial Commission, and employer brings certiorari. Award annulled, with directions.

Allen T. Sanford, of Salt Lake City, for plaintiff.

Dan D. Shields, Atty. Gen., and Jas. H. Wolfe, O. C. Dalby, H. Van Dam, Jr., and D. M. Draper, Asst. Attys. Gen., for defendant.

THURMAN, J. This case is before us on a writ of certiorari to review the proceedings of the defendant commission in the matter of an award to the dependents of one J. C. Johnson, deceased.

The findings and conclusions of the defendant are, in substance, as follows:

"That Joseph Clarence Johnson was employed by the State Road Commission, beginning in the month of February, 1919, and continuing until the 4th day of September, 1919, when he was dragging a portion of the state highway, when a thunder storm arose, and he left his team near a fence, and started toward a cabin in an adjoining field for shelter, and at a point about 150 feet distant from the team, and before reaching the cabin, he was struck by lightning and instantly killed. It was the duty of said Joseph Clarence Johnson, under his employment, to drag the state road after rains and at such other time as he was ordered so to do by his superior, and the payroll of the State Road Commission shows that his wages were $3 per day when he worked, and that he put in the following time: February, six days four hours, $19.50; March, ten days, $30.00; April, three days, $9.00; May, two days, $6.00; August, six days four hours, $19.50; total earned, $84.00. That decedent left sur-

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viving, as dependents, his widow, Harriet Elizabeth Johnson, together with Clarence W. Johnson, Theron D. Johnson, and Clara Elizabeth Johnson, minors, and that the widow and applicant expended the sum of $93.14 for funeral expenses. That from the guardianship proceedings in the district court of Emery county, state of Utah, it appears that the widow, Harriet Elizabeth Johnson, was appointed guardian for the said minors, and as such was authorized to make election to take compensation in behalf of the minors. That in the work of the State Road Commission, of constructing and maintaining roads, the customary time of employment is 5½ days per week, except as to the class of employees similar to decedent, whose duty it is to drag roads after storms, and that as to such employees their work comes only as would be required, as above stated.

"From the foregoing facts the commission concludes that the decedent came to his death as a result of an injury received by an accident arising out of or in the course of his employment, and that the dependents are entitled to compensation upon the basis of an average weekly wage of $17.30."

Plaintiff contends the evidence is insufficient to sustain the finding that deceased was seeking shelter at the time he was killed. The evidence tends to show that the deceased was employed by plaintiff in January, 1919, to drag a portion of the state road in Emery county; that his employment continued intermittently until September 3 of the same year, when he was instantly killed by a stroke of lightning. No one saw the accident, but his body was discovered shortly afterwards in a field adjacent to the road on which he had been working. The body of deceased was eight or nine rods from the road, and there is no controversy as to the cause of his death. The field in which the body was found was occupied by deceased in his lifetime, and contained an old house several rods distant from the road. The body of deceased was found between the road and the house. As to how the deceased came to be at that point is entirely circumstantial. In his work he had been driving two span of horses attached to a drag. The horses and drag were found near the road, several rods removed from where the deceased had evidently left them, and the doubletree to which they were attached was broken. The evidence also shows that at the time of his death there was in that vicinity considerable thunder and lightning, with some rain, and manifestations of a heavier storm.

[1] The circumstances above detailed are amply sufficient to justify the finding that the deceased was seeking shelter at the time of his death. The question arises, "was seeking shelter," under such circumstances, such a departure from his work as to justify a conclusion that the accident did not arise in the course of his employment? Upon this question the defendant calls our attention to a paragraph from a standard author which seems to be in point:

"It cannot be said that the employment is broken by mere intervals of leisure such as those taken for a meal. If an accident happened at such a time there would be no break in the employment, even though the workman is paid by the hour for the time he is actually at work, especially where the accident occurs on the employer's premises, or about his property, unless the workman is doing something wholly foreign to his employment. Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the Workmen's Compensation Acts, though they are only indirectly conducive to the purpose of the employment. Con-

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sequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comfort or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshment, food, or fresh air, or to rest in the shade." Honnold. Work Comp. p. 379 et seq.

See, also, Vandoren, Work Comp. 40, 41.

Plaintiff also insists that the accident causing the death of deceased was the "act of God," and not an accident within the meaning of the Industrial Act. The contention is that an "Act of God" is by implication excluded. Comp. Laws 1917, § 3112, as amended in Sess. Laws 1919, subd 5, at page 15, is relied on. It reads as follows:

"The words 'personal injury by accident arising out of or in the course of employment' shall include an injury caused by the willful act of a third person directed against an employee because of his employment. They shall not include a disease except as it shall result from the injury."

Plaintiff's rule of construction, as applied to the language quoted, is a two-edged sword. The Legislature, while engaged in excluding certain things from the category of accidents, ought to have excluded the "act of God," if such was its intention. It expressly excluded diseases not resulting from the injury. Expressio unius, etc.

[2] We not only feel justified in sustaining the finding that deceased was seeking shelter when the accident occurred, but likewise the legal conclusion that the accident occurred in the course of his employment and was one for which compensation should be allowed. We are of the opinion, however, that the accident did not arise out of the employment for the reason there does not appear to be any causal connection. This, however, in view of our present law, is immaterial. The insurer is liable whether the accident arose out of the employment or whether it arose in the course thereof. Comp. Laws, 1917, § 3113, as amended by Sess. Laws 1919, p. 158. We conclude, therefore, that the deceased came to his death as the result of an accident received in the course of his employmnt, and that his dependents are entitled to compensation for the loss as provided by law.

The amount of compensation to be allowed is the difficult feature of the case. From the facts found the defendant reached the conclusion that the dependents were entitled to compensation upon the basis of an average weekly wage of $17.30, and accordingly made an award of 60 per cent. of that amount, or $10.38 per week for a period of 312 weeks, not to exceed in all the sum of $3,238.56.

The method of computation adopted by the defendant to ascertain the average weekly wage was to first ascertain the annual earnings, and divide that by 52, the number of weeks in a year. For this purpose 300 was assumed to be the number of working days in the year. This, multiplied by $3, the daily wage amounted to $900, which sum, divided by 52, produced $17.30 as the average weekly wage. The question is, does the statute by which we are controlled justify such method of computation in the instant case? The findings show that the employment of deceased was intermittent; that the nature of the employment was such that he did not and could not have employment for 300 days in the year, either approximately or substantially. The findings themselves state the actual number of days the deceased was employed, the nature of the employment, and the conditions incident thereto. The number of days so found must have been all that was required in the employment. The total number of days of actual employment, according to the findings, was 28, and the aggregate earnings during a period of seven months, at $3 per day, was only $84. In arriving at the conclusion it did, the de-

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fendant evidently adopted some legal theory not deducible from any provision of the statute. Comp. Laws 1917, § 3142, says:

"The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits."

The statute furnishes no rule by which to compute the wage. We are compelled to blaze our own trail, and if possible construe the statute according to its plain meaning and intent. Undoubtedly the Legislature intended that the person injured, or his dependents in case of death, should be compensated for the loss upon some basis having a logical relation to his earnings in the employment. It certainly was not intended that, in every case where death resulted from accident in the course of employment, the dependents should be compensated as if the employment were continuous during all the working days of the year. No such conclusion is deducible from the language employed by the Legislature, and yet such, in effect, is the meaning of the statute as interpreted by the defendant in the case at bar. The intermittent character of the employment was not taken into consideration in making the computation. The compensation allowed the dependents is just the same as might have been allowed the dependents of a deceased person who had worked for $3 per day every working day in the year next previous to his death. The same method of computation was adopted by the defendant in a case recently decided by this court. Uintah Power & Light Co. et al. v. Industrial Commission of Utah, 189 Pac. 875.

[3] The controlling distinction, however, between that case and this is that in that case the employment was in its nature continuous throughout the year and for every working day in the year. Having found the daily wage, which was $4, this amount multiplied by 300, the assumed number of working days in the year, gave a result of $1,200 as the annual earnings. This divided by 52, the weeks in the year, determined the average weekly wage at the time of the injury. The rule adopted by the defendant in that case is reasonable and therefore permissible in every case where the employment is substantially continuous, even though the deceased is killed by an accident immediately after entering the employment.

[4] But where, as in the instant case, the employment in its nature is not continuous, but dependent upon certain conditions indeterminable in advance, we know of no rule by which to determine the average weekly wage at the time of the injury except by adopting a method of computation which gives effect to the word "average," as the same appears in the statute. It is the duty of the court to give effect to every word if possible. Unfortunately, precedents are of little or no avail in the present case. All of the adjudicated cases, as far as we have been able to examine them, are controlled by statutes almost, if not entirely, dissimilar to our own, as relates to the question now under consideration. Nearly every statute we have examined lays down specific rules for determining the basis of computation. Most of them use the words "average weekly wage" as the basis for computation, but they also prescribe the formula by which the average weekly wage is to be determined. The rules generally relate to employments continuous in their nature, and in such cases the rules quite frequently are substantially similar to the method adopted by the defendant in the present case. For instance, the number 300 is generally used as the number of working days in the year. If the work is substantially continuous throughout the year, this number is ordinarily used. We have carefully examined all of the cases called to our attention by defendant's counsel in their exceedingly able brief, but find no case which justifies the method adopted by defendant in a case of this kind. The statutes of many of the states as they relate to this particular question are found in the note to 9 N. C. C. A., commencing at page 531. Defendant cites the follow-

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ing cases in which many of the statutes are considered: In re Behrens, 188 App. Div. 66, 176 N. Y. Supp. 28; In re Prentice, 181 App. Div. 144, 168 N. Y. Supp. 55; Riley v. Motor Co. et al., 199 Mich 233, 165 N. W. 745; Robbins v. Original Gas Co. et al., 191 Mich. 122, 157 N. W. 437; Erickson v. American Well Works, 196 Ill. App. 346; Fairchild v. Pennsylvania Railroad, 170 App. Div. 135, 155 N. Y. Supp. 751; Centlivre Beverage Co. v. Ross (Ind. App.) 125 N. E. 220; Interstate Iron & Steel Co. v. Szot (Ind. App.) 115 N. E. 599; Littler v. Geo. A. Fuller & Co., 223 N. Y. 369, 119 N. E. 554. None of these cases are in point as far as relates to the facts of the instant case, but many of them are instructive and well worth reading.

The last case sighted above is a New York case, and it suggests a reasonable rule for computation in a case of this kind under a statute such as ours. The commission in that case awarded compensation on the basis of 300 times the daily wage reduced to weeks. The facts were the employment only furnished work for about 30 weeks in a year. In reversing the award the court said:

"If the nature of the employment does not permit steady work during substantially the whole year the annual earning capacity of the injured employee *in the employment* is the proper basis of compensation. Section 14, subd. 3. The true test is this: What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness." (Italics ours.)

The opinion refers to an English case (Anslow v. Cannock Chase Colliery Co., L. R. App. Cas. 1909). The following excerpt from the opinion of Lord Loreburn is illuminating:

"The question is in regard to the way in which the average weekly earnings of a workman shall be computed in a case in which a normal and recognized incident of his work was fourteen weeks' stoppage and two weeks of general holidays during the year.

"The object of the act, broadly stated, is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident. If he takes a holiday and forfeits his wages for a month, then that does not interfere with what he can earn. It is only that for a month he did not choose to earn. But if it is a part of the employment to stop for a month in each year, then he cannot earn wages in that time in that employment, and his capacity to earn is less, over the year.

"I agree with what the learned Master of the Rolls says in his judgment when he uses the following language: 'In my opinion the true test is this: What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous that is an element which cannot be overlooked.' "

The English Workmen's Compensation Act 1906, under which the opinion just quoted was rendered, as far as applicable here, and reads as follows:

"(2) For the purposes of the provisions of this schedule relating to 'earnings' and "average weekly earnings' of a workman, the following rules shall be observed.:

"(a) Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being renumerated. Provided that where, by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms

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of the employment, it is impracticable at the date of the accident to compute the rate of renumeration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

As to the meaning of the term "average weekly earnings," Halsbury, L. C., in Lysons v. Knowles & Sons, Ltd. (1901) A. C. 79, at page 87, said:

"I think it was in that popular sense, taking one day with another, that the Legislature used those words, and I think it is what everybody would understand by 'average' that his earnings were so much—not his agreed earnings by contract, there it would be definite—that if a man was employed only at irregular intervals or at irregular amounts you were to get at what the average was by putting them together and striking an average so as to afford a test of the weekly sum to be paid."

In Perry v. Wright, (1908) 1 K. B. 441, Fletcher Moulton, L. J., expressed the opinion at page 456, that—

"The term 'average weekly earnings' signifies broadly the average earnings which the workman would make in a normal week if employed on the terms prevailing before and up to the time of the accident."

The above excerpts, both as to the statute and opinions cited, are found in Knowles, Workmen's Compensation, from 189 to page 214, inclusive.

We have made somewhat extended review of the English statute and cases for the reason that the statute appears to be, to some extent, in principle similar to the statute of this state as far as average weekly earnings are concerned. There seems to be no formula given by which the earnings may be determined, but the statute is suggestive of a method, and is therefore instructive to the officer or officers charged with the duty of administering the act. It will be noted the statute says, "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman has been remunerated."

In re Rice, 229 Mass. 325, 118 N. E. 674, Ann. Cas. 1918E, 1052, is of special interest because the employment was intermittent, and the conditions, to some extent, were similar to those existing here. The applicant was a school girl who, after school hours each day, worked three hours for five days in a week, and all day Saturday in a weaving business, and earned approximately $3 per week. The accident board found that a person working as a weaver full time, six days a week, would average $7.50 a week, and allowed that sum as the basis of compensation. The Supreme Judicial Court, on appeal, held that the amount of compensation to be awarded under the statute was to be determined not by what the employee is *capable of earning*, but by what was *actually earned*. It also held that, if there was such an employment as that of "spare weaver," similar in hours of service, kind of work, and requirements of skill to that of applicant during her term of employment, that might be used as a basis for determining the compensation to be awarded under the statute. Finally, the court, in effect, held that the words "average weekly wages," under the statute, should be interpreted in their common and ordinary sense, and should be computed by dividing the total amount earned by the number of weeks of employment. It will thus be seen that the Supreme Judicial Court of Massachusetts practically applied the English rule.

In Bartoni's Case, also a Massachusetts case, appealed from the Industrial Accident Board to the Superior Court (225 Mass. 349, 114

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N. E. 663, L. R. A. 1917E, 765), it was held that the average weekly wages of a workman employed in a granite quarry, who, during the year preceding his injury, did not work for about 13 weeks of the year by reasons of inclement weather that prevented work in a quarry, are to be computed by dividing the amount of his pay for the year preceding the injury by the number of weeks that he actually worked. The governing words of the statute, as stated by the court at page 351, are as follows:

"Average weekly wages shall mean the earnings of the injured employee during the period of twelve calender months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted."

Following this quotation of the statute relating to average weekly wages, the opinion in the Bartoni Case says that this definition is significantly unlike any provision in the English act. The writer has some difficulty in noting the wide distinction suggested by the Massachusetts court, but the difference of opinion is not important.

It is contended by defendant's counsel with much force and considerable eloquence that in computing the compensation to be awarded the dependents of an employee whose death was caused by accident, the earning capacity of the deceased, and not the amount previously earned, should constitute the basis of compensation. If by "earning capacity" is meant what the employee could have earned as the business was carried on, including the element of discontinuousness incident to the nature of the employment, we have little or no fault to find with the contention; but if by "earning capacity" is meant what the employee might earn on the assumption that he worked full time, or for three hundred days in the year, we cannot agree with the contention as applied to a case of this kind. Whenever the term "earning capacity" is used in cases arising under the Workmen's Compensation Acts it will generally be found that it has reference to earning capacity in the particular employment as it is carried on. When we consider the fact that no person can possibly have an earning capacity in a particular employment greater than the opportunities afforded by that employment, we obtain a clearer conception of what is meant by "earning capacity," as the term is used in this class of cases. To say that a person had an earning capacity of $3 per day for 300 days in the year, and that therefore his compensation, or that of his dependents, should be computed on the basis of $900 per year, or $17.30 per week, where the employment in which he was injured was intermittent and could only run for a small fraction of the time, is a manifest paradox. Such a contention has no logical basis upon which to stand. We must therefore find some other method of computation in the present case more in accord with the legislative intent.

Counsel for both parties in the case have injected into the discussion theories relating to the question of insurance. Plaintiff contends that the insurance fund as collected and maintained is not sufficient to pay full-time compensation in a case of this kind, where the employment is intermittent, and there the employee had employment for only a small portion of the time. Defendant, on the other hand, insists that the fund is collected and maintained so as to follow full-time compensation for every death by accident which may occur in the course of the employment, whether the employment be intermittent or continuous. It is sufficient to say that as far as the present case is concerned, the theories advanced are academic. There is nothing in the record of that case to

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justify the court in giving such theories serious consideration. We are bound by a statute which says: "The average weekly wage of the person injured, at the time of the injury, shall be taken as the basis upon which to compute the benfits." The difficulty confronting the court is to construe that statute so as to give it effect in the instant case. It is impossible to construe it to mean exactly what it says. An average cannot be computed by means of a single factor. The ordinary meaning of the word implies that more than one factor must be considered. Webster defines the word, "A mean proportion, medial sum or quantity, made out of unequal sums or quantities." The Legislature evidently intended that the weekly wage should be computed with reference to some period of time, including the date of the injury. It intended that the wage at the time of the injury should be considered in connection with wages previously earned. For how long previous, the statute is silent. The Industrial Commission, and others upon whom the duty may be imposed, are left without a guide. They must determine the question as best they can. In the absence of a statutory formula we know of no better rule than that expressed in the English statute, supra: "The average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." We have shown, by the English decisions refered to, the method of computation adopted in that jurisdiction. If the workman is employed at irregular intervals or at irregular amounts, the wage is determined by dividing the aggregate by the number of weeks. In this case the defendant, in pursuance of a stipulation by the parties since the case was submitted, has furnished the court with a detailed statement of the days in different weeks covered by the employment in which the deceased was employed. Every period of seven days within which deceased did any work and the wages therefor are given. The period of employment commenced the 26th day of January, 1919, and continued intermittently until September 4th, the day of his death. The number of weeks covered by the intermittent employment was 31. The total amount earned was $91.50. This amount divided by 31 gives the sum of $2.95 as the average weekly wage. The fact will be noted that this method of computation takes into consideration not only the weeks in which he did some work, but also the weeks he did not work at all. This we conceive to be the spirit and meaning of the statute. The purpose evidently was to pay to the dependents of the deceased employee as compensation 60 per cent. of his average weekly earnings as the same may be calculated up to and including the date of his injury. This we have endeavored to do. It may be contended, however, that the weeks in which no work was done should not be considered in the computation—that only the weeks in which he did some work should be considered. Let us see what the result would be if that method were adopted. The number of weeks in which the deceased did some work was 18. Ninety-one dollars and fifty cents, the aggregate sum earned, divided by 18, gives as a result $5.08. This is certainly more liberal to the dependents of the deceased, but is it right? Will it stand the test of reason and common sense? Let us suppose that the deceased commenced work on the 26th day of January, and worked continuously a full week of six days at $3 per day. Let us suppose, further, that from then on to the 28th day of August he had no work, but on that day it rained. On the 29th he resumed work, and continued for six days until the moment of the accident. The amount earned would be $36, the number of weeks two, and the average weekly wage $18. The effect would be full compensation for the dependents of an employee who had employment for only two weeks in seven months and a fraction, the periods of employment being practically seven months apart. Under such method of computation 60 per

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cent. of the average wage would amount to more than the entire wages earned in the employment by the employee when living. We do not believe the statute controlling in this case is susceptible of such construction. The question is, what did the deceased earn in the employment during the period of seven months and nine days next previous to his death? That divided by the number of weeks within that period must of necessity determine the average weekly wage under the Utah statute or else the statute has no meaning at all. If the average weekly wage in this kind of a case could be determined by taking the average weekly wage of all employees in the district in the same grade of employment, as provided in the English statute above quoted, the writer is of the opinion a more satisfactory result could be achieved; but that is a matter for the Legislature and not for the court. The minimum compensation in case of death is fixed by the statute at $2,000, so that in any event all that can be said of our decision in the present case is that where the employment is intermittent it establishes the rule by which the average weekly wage of the employee under the act may be determined.

The conclusions of the defendant commission are not supported by the findings, and for that reason the award is annulled and set aside, with directions to defendant to proceed in accordance with the views herein expressed.

FRICK, J. I concur. I am free to confess, however, that I have had some difficulty in arriving at what to my mind seems a satisfactory conclusion in this case. After carefully considering the text of our Workmen's Compensation Act ,and after comparing its provisions with those of other similar acts, and upon mature reflection respecting the controlling purpose of such acts, I can see no escape from the conclusion reached by my associate, Mr. Justice Thurman. In this case it is conceded by both sides that the regular course of employment of the deceased was necessarily irregular and intermittent; that is, that the work he was employed to do was necessarily such that he could be employed only a portion of his time. It is also conceded that when he was not doing road work he was engaged in agricultural labor on his farm, an employment which is not embraced within the Workmen's Compensation Act. Keeping in mind, therefore, that in case of injury the purpose of the act is to compensate the injured employee for loss of time, and in case of his death to compensate those who are dependent upon him for support for the actual pecuniary loss they will sustain by reason of being deprived of his earnings, it follows, as a necessary corollary, that the amount of compensation to either the injured employee, or, in case of his death, to those who are dependent upon him, ordinarily cannot exceed the amount the deceased earned in the particular employment in which he was engaged at the time of his death. Under such circumstances it is of the utmost importance to keep in mind two things: (1) That the compensation act does not cover the ground of old-line accident insurance; and (2) that it is the actual amount earned in the course of the employment, and not the earning capacity of the deceased, which constitutes the basis of compensation under the act. By what is actually earned is meant the wage that is paid to the employee in the course of his regular employment. If, therefore, the employment is continuous, the days that he may "lay off," even though voluntary, are not deducted when the average weekly earnings are ascertained. If, however, as here, the employment in its very nature is intermittent, and the employee necessarily can earn wages only a part of the time, then the average weekly wage thus earned during the whole period of the employment, or for at least such a length of time as will give the true average, must be taken as the basis for computing the amount that should be allowed under the statute. In order, therefore,

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to arrive at a just result it is necessary to ascertain the average weekly wage the employee earned in the regular course of his employment, ascertained as just stated, since that is what those who are dependent upon him for support are deprived of in case of his death, and that is what the statute contemplates shall be awarded to them during the period of time fixed in the statute. That such is the purpose of the statute is manifested in various ways by its language. The provision respecting the basis of compensation, as well as the provision which makes the amount of the pay roll the basis for contributions to the fund from which the compensation is paid, clearly indicate that such is the purpose of the act. Where the employment is regular and continuous, and the rate of wage is fixed, there can be no difficulty whatever in arriving at a just result. Where, as here, however, the regular employment is intermittent the only correct method of arriving at a just result is the one pursued by Mr. Justice Thurman in his opinion. The reason why, under such circumstances, the earnings for at least the period of time before stated must be reduced to a weekly average, is not hard to understand. Indeed, it is quite obvious. For example, if the regular course of the employment is intermittent, as here, and the employee works only one-third or less of the time covered by his employment, then his average weekly wage is necessarily less than what he actually earned in the particular week or on the particular day he was accidentally killed. In view, therefore, that the compensation which is awarded in each case under the statute is for a continuous weekly allowance, and not only for the one-third or less of the time the employee may have been actually engaged at work, his earnings must be averaged for the whole number of weeks, and in that way the correct amount which the statute assumes he contributed to those who were dependent upon him for support must be ascertained. If the compensation under the circumstances just stated, were based upon what the employee actually earned during the week or on the day he was killed, the dependents would receive the sum equal to three or more times the amount they were actually deprived of; that is, three or more times the amount he, in contemplation of the statute, could have contributed to them during the time he was employed.

If the act were intended to take the place of ordinary accident insurance, or if it were intended to cover losses other than those which are merely pecuniary, the case would be different. In this connection it must always be kept in mind, however, that where the work is regular and continuous, or substantially so, and the wages of the employee have been increased from time to time, then these circumstances must be considered when the amount of compensation to be awarded is determined. In each case the evidence relating to those matters should, however, be reflected in the findings, and be carefully considered in determining the amount to be allowed as compensation, and the statutory provisions in that regard should be carefully observed.

The method pursued by the Industrial Commission in fixing the compensation in this case, as clearly pointed out by Mr. Justice Thurman, in my judgment is not only unsound in principle, but is in direct conflict with both the letter and the spirit of our statute. In that the compensation allowed is upon a basis as though the deceased worked all of the time when in fact he worked only a small part of the whole time during which he was employed in road work; and thus the amount awarded is far in excess of the earnings of the deceased, and hence far in excess of what his dependents could have received from the earnings derived from the work in which he was engaged Moreover, the dependents in this case are allowed compensation for the time in which the deceased was engaged in agricultural work, which is expressly excluded from the act. If, therefore, the deceased had been killed while repairing

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his farm, or while doing something else on the farm, his dependents would have been remediless.

It is true that by reason of the death of the deceased his dependents are deprived of his entire earning capacity. That, however, is a misfortune not covered by the statute (except as it may be covered by the minimum amount allowed) and therefore cannot be considered here. It is manifestly our duty to apply the law as we find it, and, in case any other tribunal, board, or commission over which the law requires us to exercise jurisdiction misinterprets or erroneously applies the law, it is our duty to correct the error in case the proceedings are brought here for review.

GIDEON, J. (concurring in part). The facts surrounding the employment of the deceased by the State Road Commission and the terms of the employment are not in dispute. The duty of the deceased was to drag or level the road after storms, and he was to determine the necessity for such work. In the very nature of the case his employment was intermittent. He might be required to do work once or oftener in one week, and again it might not be necessary to do any work for a period of several weeks. The record in this proceeding discloses that that is just what happened. It seems to be established beyond controversy that of the 31 weeks between the date of the first employment and the date of death there were only 18 weeks in which the deceased actually did any work. Mr. Justice Thurman concludes that in arriving at the average weekly wage the court should take into consideration the full number of weeks from the commencement of his employment to his death. I can see no reason why that particular arbitrary rule should be adopted. Clearly the deceased was not an employee of the State Road Commission except at such times as he was actually engaged in the work. As indicated, there were weeks when he was not so employed. It will not be contended by any one that, if deceased had been struck by lightning during some week when he did no work for the road commission and while engaged at farm labor, he would be entitled to compensation for such accident. The rule should work both ways. If he was an employee during all of those weeks to the extent that that time must be considered in arriving at his average weekly wage, it would seem, a fortiori, that he was therefore such an employee as would be entitled to compensation in the event of accident The rule adopted appears to be unnecessarily harsh upon both the employee and his dependents and contrary to the general spirit of the act. In many cases it would defeat the very purpose of the act, which is to compensate the widow and other dependents for the pecuniary loss sustained through the death of their provider. It is easy to perceive various kinds of intermittent employment where the employee is called upon to perform labor one week, and probably is not again called upon for several weeks. In such cases, if the entire number of weeks between the first employment and the time of the accident is to be used as a divisor in determining his average weekly wage, it might, and would likely result in reducing such average weekly wage to a sum trifling in comparison with what the employee was actually earning, or capable of earning by his labor. I cannot conceive that such was the intent of the Legislature. A more rational rule, it seems to me, since it is absolutely necessary to determine the average weekly wage, is to count the number of weeks during which he actually worked one or more days Such, as I understand, is the position of the manager of the State Insurance Fund, as outlined in his letter addressed to the Industrial Commission under date of January 15, 1920.

The argument is advanced that to allow the applicants in this case full compensation as fixed by the commission would result in giving to

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the dependents (applicants) much more than the deceased would have received from the particular employment if the accident had not occurred and the employment had continued. If that element is to be considered in determining the amount of compensation to be awarded, then the award of the commission in the recent case of Amalgamated Sugar Co. et al. v. Industrial Commission, 189 Pac. 69, should not have been affirmed. The deceased there was employed by the Amalgamated Sugar Company at $4 per day, or $24 weekly. It is a matter of common knowledge that the duration of the operating season of sugar factories in this state is approximately 12 weeks. The total wage that the deceased in that case would have earned, therefore, had he worked the full season, would have been approximately $288. Notwithstanding that fact, his dependents were awarded an amount exceeding what his entire wages would have been from that employment had he continued therein for more than 15 years.

While I concur in the result, I do not agree with the method suggested by Mr. Justice Thurman in determining the average weekly wage in employments of this kind.

HARLOFF et al. v. MERWIN et al.

(Supreme Court of Wisconsin. June 1, 1920.)

177 Northwestern Reporter 913.

1. MASTER AND SERVANT — COMPLAINT OF EMPLOYER SEEKING TO SET ASIDE AWARD OF COMPENSATION AMENDABLE.

Under St. 1919, § 2394—19, an employer, suing to set aside an award of compensation to his injured servant by the Industrial Commission, could amend his complaint by setting up as an additional ground certain matter relating to a settlement by the injured employee with the third person whose negligence caused his injuries.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

2. MASTER AND SERVANT — ACCEPTANCE OF MEDICAL SERVICES FROM NEGLIGENT THIRD PERSON HELD NOT ELECTION UNDER COMPENSATION ACT.

In view of circumstances of case, acceptance by injured employee during some weeks of medical, surgical, and hospital services from third person who caused his injuries *held* not to have constituted an election under Workmen's Compensation Act (St. 1919, § 2394—25); the question in each case being one of intention.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceedings under the Workmen's Compensation Act by Harry Merwin, the employee, against H. C. Harloff, the employer, and the Royal Indemnity Company, the insurer. Compensation was awarded

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by the Industrial Commission, the award vacated and set aside by the circuit court at the employer's instance, and the Commission appeals. Affirmed.

Merwin was an employee of Harloff. Harloff lived on a farm a short distance from the city of Milwaukee, and was subject to the provisions of the Compensation Act (St. 1919, §§ 2394—1 to 2394—32). While going from the farm of his employer to Milwaukee, Merwin rode his motorcycle, which was fastened to the rear of his employer's wagon. He intended to take the motorcycle to a shop for repair. Merwin was run into by one E. M. Brah, and sustained severe injuries. He was immediately taken to a hospital, where he remained for about 11 weeks. His employer and the insurance carrier paid the surgical, medical, and hospital bills. While in the hospital Merwin was visited by Brah, who admitted his liability for the injuries which Merwin had sustained, and Brah proposed a settlement. After some solicitation by Brah, and on the 19th day of September, 1916, Merwin accepted from Brah $1,000 in cash and an automobile worth $200. Within a day of the expiration of two years from the date of his injury Merwin filed a claim for compensation against his employer under the provisions of the Workmen's Compensation Act. The settlement with Brah was made after Merwin was fully advised as to his rights under the compensation law, and, further, that if he made the settlement it would constitute an election on his part, and that his employer would not be liable. The Industrial Commission held that the acceptance of the medical, surgical, and hospital treatment constituted an election on Merwin's part which amounted to the making of a claim; that Merwin, therefore, at the time he made the settlement with Brah, was not the owner of the claim, and that the settlement was a nullity; that the employer was liable for compensation; allowed credit for the $1,200 received by Merwin, and gave him an award against his employer for $280.45.,

The employer began this action in circuit court of Dane county to review the award made by the Industrial Commission. The original complaint alleged that the Industrial Commission acted without and in excess of its powers in making each of six different findings; the allegations being made in separate paragarphs as to each finding. The complaint, however, made no reference to the fact that the commission had failed to find that a settlement was made by Merwin with Brah. Upon the trial, September 2, 1919, the court permitted the complaint to be amended, so as to set up the settlement. The trial court held that the payment of the bill for medical, surgical, and hospital care did not amount to "the making of a lawful claim for compensation" within the meaning of subdivision 1 of section 2394—25, Wis. Stat., that it did appear that the employe had made a claim against the third party for damages, and in addition had fully settled such claim; that the making of such claim was a waiver of any claim for compensation against his employer.

Judgment was entered, vacating and setting aside the award of the Industrial Commision, and from this judgment the Industrial Commission appeals.

John J. Blaine, Atty. Gen., and Winfield W. Gilman, Asst. Atty. Gen., for appellant.

James T. Drought, of Milwaukee, for respondent Harloff.

Lorenz & Lorenz, of Milwaukee, for respondent Merwin.

ROSENBERRY, J. (after stating the facts as above). The appellant contends that the trial court erred in allowing an amendment to the complaint. Section 2394—19 provides:

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"* * * Within twenty days from the date of the order or award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commisson for the review of such order or award, * * * in which action a complaint, which shall state the grounds upon which a review is sought, shall be served with the summons. * * * Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

"(1) That the commission acted without or in excess of its powers.

"(2) That the order or award was produced by fraud.

"(3) That the findings of fact by the commission do not support the order or award."

The complaint alleged " that the defendant the Industrial Commission of Wisconsin acted without and in excess of its powers in making the following finding"—after which the first finding was set out. With a like introduction each of the six findings made were set out. The contention of the appellant is that each of the separate paragraphs constitute a cause of action, and that the introduction by way of amendment of the matter relating to the settlement was the introduction of a new cause of action, and therefore not permissible because by the terms of the statute such action was not brought within 20 days of the date of the order or award, as provided in the statute.

[1] We regard this as entirely too technical and restrictive a construction upon the provisions of the statute in question. There is only one cause of action—that to review the award of the commission. It may proceed upon any of three grounds, and not upon other grounds. The matter brought in by way of amendment alleged additional facts upon which the plaintiff sought to maintain its allegation that the commission had acted without or in excess of its powers. There was but one cause of action, and not six. In making the award the commission could act but once without or in excess of its powers. Inasmuch as the amendment introduced no new cause of action, but set out additional facts upon which the plaintiff's cause of action might be maintained, reference to cases holding that where a cause of action is barred by the statute of limitations it cannot be introduced by way of amendment to an action begun before the statute applied have no bearing upon this question. Had the plaintiff sought to introduce by amendment facts which tended to show that the award should be set aside because produced by fraud, or that the findings did not support the award, a different question would be presented, as to which we make no intimation.

The second contention of appellant is that the court erred in holding that Merwin elected to pursue his common-law remedy against Brah, and the plaintiffs were thereby released from liability for compensation.

Section 2394—25, Stat. 1915, provides:

"1. The making of a lawful claim against an employer * * * for compensation under sections 2394—3 to 2394—31, inclusive, for the injury or death of an employee shall operate as an assignment of any cause of action in tort which the empolyee or his personal representative may have against any other party for such injury or death; and such employer * * * may enforce in his own name the liability of such other party. * * *

"2. The commencement of an action by an employee against a third party for damages by reason of an accident covered by sections 2394—3 to

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2394—31, inclusive, * * * shall operate as a waiver of any claim for compensation against the employer."

This assignment of error involves the contention that, by accepting the medical , surgical, and hospital services furnished by the plaintiffs, Merwin had made an election under the provisions of subdivision 1 of section 2394—25.

In the month of August, 1916, the attorney for Merwin wrote several letters to Harloff in relation to Merwin's claim. On August 17th he wrote:

"What agreement or terms have you come to with Mr. Brah in relation to the personal injury suit of Harry Merwin? * * * Mr. Merwin is desirous of having the same adjusted with as little delay as possible, and if no action against Mr. Brah will be successful, that we can have the same adjusted by your company."

On August 30th he wrote:

"Unless some substantial offer of settlement is made, we will have to proceed to a hearing before the Industrial Commission to adjust the same."

On September 15th he wrote:

"I have been waiting for a reply concerning the Merwin matter, regarding which some time ago you stated that undoubtedly the same would be settled within a short time. I wish you would give me full and exact information regarding Mr. Brah's attitude towards this case and what he intends to do regarding settling the same, so that I may be in position to proceed accordingly."

On September 19th Merwin settled with Brah, executing a full and complete release.

[2] Admitting that the medical, surgical, and hospital services rendered constitute compensation in ordinary cases, we are of the opinion that the Industrial Commission was in error in holding that acceptance of such aid under the circumstances of this case constitute an election under the provisions of section 2394—25. We shall not attempt to lay down a rule which shall apply to all cases. Whether or not the injured employee has made an election under this provision of the statute is a question of intention in each case, and each case must therefore rest upon its peculiar facts. It may be said, however, that in any case the injured employee must do something which amounts to an election on his part to claim satisfaction either from his employer or the negligent third party, for the injury which he has sustained. Until he has done something which evidences his intention to pursue either the one course or the other, the choice remains open to him. The passive acceptance of medical, surgical and hospital aid did not in this case amount to such an election. When taken to the hospital he was unconscious, and in no position to make an election. How can an election be inferred under such circumstances? At what point in his convalescense can it be said that acceptance of such aid constituted an election to claim satisfaction of his employer? The statute should be so construed as to give the employee a choice free from any restraint. The acceptance of temporary benefits, although in this case extending over a period of 11 weeks, and amounting to a considerable sum, did not constitute such an election. The evidence, including the letters of his attorney, shows plainly that he wavered in his choice, and that when he did choose he chose to proceed against Brah. Procedure against the third party is made by the terms of the statute to operate as a waiver of any claim for compensation against the employer.

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The trial court therefore correctly held that the award of the Industrial Commission should be vacated and set aside.

Judgment affirmed.

Winslow, C. J., and Kerwin, J., took no part.

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MANCHESTER ST. RY. v. BARRETT. (No. 1445.)

(United States Circuit Court of Appeals, First Circuit. May 18, 1920.)

265 Federal Reporter, 557.

3. MASTER AND SERVANT—EVIDENCE OF VIOLATION OF RULE HELD TO WARRANT A FINDING OF NEGLIGENCE.

Evidence of violation of a street railway rule requiring cars to slow down and sound gong when passing another car which was running slowly is sufficient to warrant a finding of negligence in an action for the death of an employee, who had just stepped from behind a car which slowed down to permit him to alight.

(For other cases, see Master and Servant, Dec. Dig. § 278[19].)

4. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE HELD FOR JURY.

An employee can rely on a rule requiring a passing car to slow down, so that the question of his contributory negligence in stepping from behind one car in front of another is for the jury, especially under a state Employers' Liability Act, placing the burden of proving contributory negligence on the employee.

(For other cases, see Master and Servant, Dec. Dig. § 289[4].)

5. MASTER AND SERVANT—INJURY TO STREET CAR MOTORMAN GOING TO DINNER "ARISES OUT OF AND IN THE COURSE OF HIS EMPLOYMENT," WITHIN COMPENSATION ACT.

Where a street car employee, who was injured by a car just as he was alighting from the one on which he was riding home to dinner, between his morning and afternoon hours of duty, his injuries arose out of and in the course of his employment, within Employers' Liability Act N. H. §§ 1, 2.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

6. MASTER AND SERVANT — STATE COMPENSATION ACT SHOULD BE LIBERALLY CONSTRUED.

The New Hampshire Employers' Liability Act, like compensation acts generally, is a remedial act, and is to be liberally construed; its underlying policy being that some fair part of the economic loss caused by industrial accidents shall be borne by the industry.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by Ellen Barrett, administratrix, against the Manchester Street Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

De Witt C. Howe, of Manchester, N. H. (George H. Warren and Warren, Howe & Wilson, all of Manchester, N. H., on the briefs), for plaintiff in error.

Alexander Murchie, of Concord, N. H. (Murchie & Murchie, of Concord, N. H., on the brief), for defendant in error.

Before Bingham, Johnson, and Anderson, Circuit Judges.

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ANDERSON, C. J. This was an action brought by the administratrix of William J. Allen against the Manchester Street Railway to recover damages for personal injuries and the resultant death of the plaintiff's decedent.

Allen was a motorman in the defendant's employ, and was injured on Sunday, December 21, 1913, at about noon.

The action was brought under the New Hampshire Employers' Liability Act. Laws N. H. 1911, c. 163, §§ 1, 2. This act permits recovery for injuries suffered by employees engaged in the operation of electric cars, when such injuries arise "out of and in the course of the employment" and are caused "by the negligence of the employer or any of his or its officers, agents, or employees."

The defendant pleaded the general issue and a release executed by Allen on March 14, 1914, about three months after his accident. To this plea the plaintiff filed a replication, setting up: (1) That the release was not Allen's deed; (2) that it was obtained by fraud. The defendant joined issue on this replication. The trial resulted in a verdict for the plaintiff for $2,600, and the defendant brought this writ of error.

The salient facts which the jury were warranted in finding are, briefly stated, as follows:

At the time of the accident, Allen's forenoon run ended at 11:15 and his afternoon run began at 2:30. Within the intervening period he was accustomed to go home to his noon meal, riding, as of right, and in accordance with the established custom among the defendant's employees, upon the defendant's cars. His house was on the north side of Lake avenue, about midway between two regular stops. It was customary for the motorman to slow down the car in order to allow Allen, and at times members of his family, to drop off opposite his home. There was no rule of the company forbidding such slowing down of cars to permit employees to swing off.

A rule of the defendant company provides as follows:

"*Cars Stopped or Running Slowly.*—When passing cars that are not moving, motorman will bring his car to a stop, and will not start until he receives two bells from the conductor. *When passing a car that is moving slowly, motorman must also run slowly, ringing his gong and going very carefully.*"

The negligence relied upon is the failure of the motorman on the car that struck Allen to comply with the latter part of this rule, printed in italics.

On this Sunday, the car on which Allen was riding slacked to 3 or 4 miles an hour; opposite his house Allen swung off the car, and in order to reach his house had to cross the other or west-bound track. Just as he passed behind the car from which he had alighted, which was moving slowly away from him, a car coming in the opposite direction, which ordinarily was met further out on the trip, shot by without slacking or sounding any gong.

While the evidence shows that Allen saw or heard this car and drew back, he failed to get himself out of range; the car struck him, hurled him some 20 feet, and ran 130 feet or more before it finally stopped. The car was of steel and equipped with unsual power for winter work.

There was evidence that the car which struck him was running at the rate of 25 miles or more an hour, and was speeding up in order to take a rise further along. Allen was rendered unconscious by the blow; his skull was broken. For the next 2 or 3 months he at times had hallucinations; he spit blood; he expressed a desire to kill members of his family and himself; he walked in the snow in his bare feet; he did many other things indicating that the blow and fracture of his skull had destroyed or seriously impaired his mental grasp.

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In March, however, he had made a partial recovery, and desired to resume work for the defendant. The defendant company's claim agent thereupon induced him to execute a release, paying him in cash an amount equal to what his wages would have been,, and assuming also the doctor's and hospital bills. The release was not under seal. The evidence warranted the jury in find ng that the claim agent knew Allen was not mentally fit to understand the nature and significance of his act in signing this release. The defendant does not argue that the evidence did not warrant the jury in finding the release inva'id.

Defendant's counsel argue their assignments of error under three heads. We follow this classification.

I. Defendant contends that the release was a bar to the action unless and until set aside in equity.

[1] As pointed out above, the defendant jo'ned issue on the plaintiff's replication , which sets up that the release was not Allen's deed and that it was obtained by fraud. It did not demur to this replication. It made no contention that the validity of the release should not be tried as a part of this suit at law, until the evidence of the plaint ff was in. But, if we assume that the point was not thus wa.ved, and is now open to the defendant, it is without merit . See Union Pacific Railway v. Whitney, 198 Fed. 784, 117 C. C. A. 392; Union Pacific Railway v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003; Genest v. Odell Mfg. Co., 75 N. H. 365, 74 Atl. 593; Piper v. Railroad. 75 N. H. 228, 72 Atl. 1024. Compare the amendment of March 3. 1915 (38 Stat. 956), to section 274b of the Judicial Code, 38 Stat. 956 (U. S. Comp. Stat. 1916, § 1251b), providing for equitable defenses in actions at law; also U. S. v. Richardson, 223 Fed. 1010, 1013. 139 C. C. A. 386.

[2] The question of the validity of the release was submitted to the jury under instructions to the effect that the burden was upon the plaintiff to establish by clear and convincing proofs that Allen was not conscious of what he was doing in its comprehensive and substantial sense; that this required something more than a mere preponderance of evidence, that the jury must be convinced that Allen "was not in a condition to appreciate the thing that is set up against him."

The defendant has no cause to complain of these instructions as to the character and degree of proof required; it is far from clear that they were not too favorable to the defendant.

II. Defendant's second contention is that a verdict should have been directed in its favor.

[3] In support of this main contention it is argued that the defendant was not negligent. But clearly there was evidence warranting the jury in finding negligence. The rule requiring a motorman, when passing a car moving slowly, also to run slowly, ringing the gong and going very carefully, was intended to guard against just such accidents as caused Allen's injury.

[4] But the defendant also contends that, even if the defendant was negligent, Allen was guilty of contributory negligenec. This was for the jury. Allen knew of the rule, and had a right to rely upon its being complied with. Under the New Hampshire Employers' Liability Act, supra, the defendant has the burden of proof on this issue. Even if the evidence were evenly balanced, the plaintiff might recover. Murphy v. Railroad. 77 N. H. 573, 94 Atl. 967; Nawn v. Railroad, 77 N. H. 299, 305, 91 Atl. 181. As pointed out in this latter case, the burden being now upon the defendant, "the cases would seem to be few in which the judgment of the jury "must not be invoked."

The defendant's contention, of course, is that Allen should have seen the car and kept back out of its line of approach. But the space between the car from which he had alighted and the car which struck him was only 8 or 10 inches. The approaching car might have been found to be running at the rate of 25 miles an hour or more. There was snow on

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the ground. The only negligence imputable to Allen was his failure to look for a second, or perhaps a fraction of a second, within which time he was stepping from behind the rear of the car from which he had alighted within the range of the swiftly oncoming car. It was for the jury to say whether, in the light of his knowledge of the rule requiring such oncoming car to move slowly and to sound the gong, of his knowledge that the car was usually met further out, and of the fact that he was accustomed to alight from this car and safely cross to this house, his failure within this brief instant of time to see and avoid this approaching car was or was not contributory negligence.

[5, 6] Defendant also contends that the case does not come within the New Hampshire Employers' Liability Act on the ground that the accident did not arise "out of or in the course of the employment."

This assignment is without merit. It calls for no elaborate discussion. Allen rode home on the defendant's car and alighted therefrom as an incident of his employment. He was not out as a pleasure seeker or as a church-goer. He was a motorman going to his dinner. Under such circumstances, the overwhelming weight of authority is that the injury was suffered as a natural incident of his work. The New Hampshire Employers' Liability Act, like compensation acts generally, is a remedial act, and is to be liberally construed. See Lizotte v. Nashua Mfg. Co., 78 N. H. 354, 357, 100 Atl. 757; Morin v. Nashua Mfg. Co., 78 N. H. 567, 569, 103 Atl. 312; Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 Atl. 859, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280.

The underlying policy of the modern Compensation and Employers' Liability Act is that some fair part of the economic loss caused by industrial accidents shall be borne by the industry. Allen's accident was plainly an industrial accident; at any rate there was evidence warranting the jury in so finding. It is enough to cite a few of the numerous cases dealing with this point: Donovan's Case, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778; Sundine's Case, 217 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318; Hallet's Case, 232 Mass. 49, 121 N. E. 503. In these opinions many of the large number of other cases are cited and discussed. See, also, article in 25 Harvard Law Review, p. 401, by Francis H. Bohlen, in which there is an elaborate and learned discussion of the phrase found in most of the Compensation Acts, "arising out of or in the course of employment," citing and reviewing the leading cases.

III. Finally, defendant's counsel contend that the jury was erroneously instructed.

We find no merit in this contention. Indeed, the defendant's requests for instructions, except so far as included in the contentions discussed above, were in substance—very nearly in words—given. The charge was careful and accurate, and fully protected all the defendant's rights.

The judgment of the Distirct Court is affirmed, with costs to the defendant in error.

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SCHMIDT v. PURSELL et al. (Civ. 3362.)

(District Court of Appeal, First District, Division 2, California. May 11, 1920. Hearing Denied by Supreme Court July 8. 1920.)

190 Pacific Reporter 846.

2. MASTER AND SERVANT—NONCOMPLIANCE WITH SAFETY ORDER NOT "GROSS NEGLIGENCE" WITHIN COMPENSATION ACT.

Failure of master to comply with general safety order of the Industrial Accident Commission of which he had no notice would not of itself constitute "gross negligence" within the meaning of Workmen's Compensation, Insurance, and Safety Act, § 12(b), as amended by St. 1915, p. 1081, § 2.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

(For other definitions, see Words and Phrases, First and Second Series, Gross Negligence.)

3. MASTER AND SERVANT—SAFETY ORDER OF INDUSTRIAL ACCIDENT COMMISSION NOT CONCLUSIVELY PRESUMED REASONABLE IN ACTION FOR DAMAGES.

In an action by a servant for damages for gross negligence under Workmen's Compensation, Insurance, and Safety Act, § 12(b), as amended by St. 1915, p. 1081, § 2, general safety orders of the Industrial Accident Commission are not conclusively presumed to be reasonable and to fix reasonable and proper standards and requirements for safety, under section 66 of the act.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

4. MASTER AND SERVANT—GENERAL SAFETY ORDERS OF INDUSTRIAL ACCIDENT COMMISSION MUST BE SERVED UPON EMPLOYER UNDER COMPENSATION AND SAFETY ACT.

Safety orders of the Industrial Accident Commission do not become effective until served upon the employer, under Workmen's Compensation, Insurance, and Safety Act, § 59.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

5. MASTER AND SERVANT—ESSENTIALS FOR RECOVERY FOR GROSS NEGLIGNCE UNDER COMPENSATION ACT STATED; "WILLFULLY DISREGARD."

It is incumbent upon a servant suing for personal injuries caused by gross negligence, under Workmen's Compensation, Insurance, and Safety Act, § 12(b), as amended by St. 1915, p. 1081, § 2, to prove that injury resulted both from gross negligence and from willful disregard of life, limb, or bodily safety; the term "to willfully disregard" meaning to intentionally do or fail to do something which contributed to the injury, having actual knowledge of the perils incident thereto, or having what in law is equivalent to such actual knowledge.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Frederick A. Schmidt against Henry Pursell and Arthur Pursell, doing business under the name and style of Pursell Bros. Judgment for defendants, and plaintiffs appeal. Affirmed.

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Warren L. Williams, of Los Angeles, for appellant.
Duke Stone, of Los Angeles, for respondents.

NOURSE, J. Plaintiff appeals from a judgment in favor of defendants in an action for damages for personal injuries sustained by plaintiff while in the employ of the defendants. Plaintiff chose to avail himself of section 12 (b) of the Workmen's Compensation, Insurance, and Safety Act, as amended in 1915 (Stats. 1915, p. 1081, § 2), and effective at the time of the injury, and waived compensation under the act. Section 12 then provided that, when conditions of compensation existed, the right to recover pursuant to the provisions of the act should be the exclusive remedy against the employer, "except that when the injury was caused by the employer's gross negligence or willful misconduct and such act or failure to act causing such injury * * * indicated a willful disregard of the life, limb, or bodily safety of employees, any such injured employee may, at his option, either claim compensation under this act or maintain an action at law for damages." The complaint alleged that the accident was the result of the gross negligence of the defendants in failing to properly equip a jointer machine upon which plaintiff was employed with the necessary safety appliances, and also that it was the result of the willful disregard of the life, limb, and bodily safety of the plaintiff on the part of said defendants in refusing and neglecting to equip said machine with such safety appliances. It was also alleged that the cylinder head and guard was a necessary equipment and part of said machine to prevent the operator thereof from coming in contact with the knife and mangle. These allegations were all denied by the answer, and the court found that the defendants were not guilty of gross negligence nor of a willful disregard of the life, limb, or bodily safety of the plaintiff in refusing to equip said machine with such safety appliances, and also that such safety appliances were not at the time a necessary equipment to prevent the operator thereof from coming in contact with the knife or mangle of the machine. It was also found, in accordance with the allegations of the answer, that plaintiff was thoroughly familiar with the workings and the danger incident to the use of the machine. The appeal is confined solely to an attack upon that portion of the findings which negative gross negligence on the part of the defendants.

The facts material to the opinion are that plaintiff had been in the employ of defendants for some five months prior to the accident and had become thoroughly familiar with the machine upon which he received the injury. He was an experienced operator and had worked for many years on machines of this nature, some of which had guards or safety devices; others had not. On July 20, 1917, five days prior to the date of the injury, an employee of the Industrial Accident Commission notified defendants that the machine should be equipped with a safety device, and, acting upon such notice, the defendants placed an order for such equipment, which, however, had not been received at the time of the injury. In this connection one of the defendants testified that they had not been notified prior to the 20th of July to equip the machine with a safety device, and that it was impossible to obtain one within the five days.

[1] The theory of appellant is that the failure of respondents to comply with the general order of the Industrial Accident Commission relating to the equipment of similar machines with safety devices, after having been personally instructed so to do in this instance by one of the employees of the commission, constitutes gross negligence entitling appellant to recover in this case. The argument in this connection is based upon a misunderstanding of the record, in that the record fails to disclose that any general order of the Industrial Accident Commission was offered or received in evidence. In the briefs it is argued that a certain general order of the commission required the equipment of similar ma-

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chines with cylindrical cutter heads, but this order was not offered in evidence, and, though it may have been referred to in argument before the trial judge, it is not such a matter as can be given judicial notice. Thus the argument of appellant resolves itself into this, that the failure of defendants to equip the machine with safety devices immediately upon the direction of the employee of the Industrial Accident Commission constitutes gross negligence on their part. In his opening brief it is said:

"We would not be understood as insinuating that violation of the statute in itself constituted 'gross negligence.' That is not our position here."

[2-4] If the violation of a statute in itself does not constitute gross negligence (and there is respectable authority to that effect, though in reserving decision upon that point in an order denying a hearing after judgment in the District Court of Appeal of the Second District in Helme v. Great Western Milling Co., 185 Pac. 510, our Supreme Court has cast some doubt upon the extent of the rule in this state), surely the failure to comply with some general safety order of the Industrial Accident Commission of which the employer may have had no notice would not constitute gross negligence. Section 66 of the act (St. 1913, p. 309), as in effect at the time of the injury, provided that every order of the commission should be admissible as evidence in any prosecution for the violation of certain provisions of the act, and that in every such prosecution they should be conclusively presumed to be reasonable and to fix reasonable and proper standards and requirements for safety. But by this section the orders are conclusively presumed to be reasonable only in prosecutions for violations of the act. The presumption does not apply to an action for damages instituted by an employee under section 12 (b). Furthermore these orders do not become effective until served upon the employer. Section 59. The record discloses that no service was made of any order upon defendants other than the oral instruction given to them by an employee of the Industrial Accident Commission on July 20th. As to this instruction it does not appear what time was given the employers to comply, and the reasonableness of the order having been directly put in issue by the allegations of the complaint of the necessity of equipping the machine with a certain safety device, and the court having found that such was not necessary, it must follow that the finding of the court upon the issue of gross negligence and willful disregard of the safety to the employee was proper, and that any other finding under the circumstances would have had no support in the evidence.

[5] Furthermore, appellant having waived his right to compensation afforded him by the Workmen's Compensation, Insurance, and Safety Act, and chosen to proceed in this action at law for damages, it was incumbent upon him to prove that the injury resulted both from the gross negligence (or willful misconduct) of respondents and from the willful disregard of the life, limb, or bodily safety of appellant. The willful disregrad of the safety of an employee means something more than mere negligence or carelessness. To willfully disregard the safety of an employee is to intentionally do or fail to do something which contributes to the injury, having actual knowledge of the perils incident thereto, or having what in law is equivalent to such actual knowledge. The trial court found that respondents did not know that the machine was dangerous to operate without a safety device, and this finding is not attacked. Such being the case, the willful disregard of life, limb or bodily safety, which is a necessary element to recovery in an action of this nature, was not shown.

The judgment is affirmed.

We concur: Langdon, P. J.; Brittain, J.

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CITY AND COUNTY OF SAN FRANCISCO v. INDUSTRIAL ACC. COMMISSION ET AL. (S. F. 9260.)

(Supreme Court of California. June 30, 1920. Rehearing Denied July 30, 1920.)

191 Pacific Reporter, 26.

3. MASTER AND SERVANT — "INJURY" IN PROVISION FOR WORKMEN'S COMPENSATION INCLUDES DISEASE.

In view of the construction of the word "injury" in Workmen's Compensation Act, § 3, subd. 4, and section 6, Const. art. 20, § 21, providing the Legislature may create and impose liability on employers to compensate employees for any "injury" in the course of employment, irrespective of the fault of either party, permits an award of compensation for death of a city's hospital employee, caused by influenza contracted in the course of employment, and not by any bodily injury through violence.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

(For other definitions, see Words and Phrases, First and Second Series, Injury.)

4. MASTER AND SERVANT — EVIDENCE HELD TO SUSTAIN CONCLUSION INFLUENZA CONTRACTED IN EMPLOYMENT.

In a widow's proceeding under the Workmen's Compensation Act for death of a city's hospital employee from influenza, evidence *held* sufficient to sustain the conclusion of the Industrial Commission that the employee contracted influenza in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

In Bank.

Proceedings for compensation for death of her husband under the Workmen's Compensation Act, by Geraldine Slattery, opposed by the City and County of San Francisco, a municipal corporation, the employer. To review an order of the Industrial Accident Commision awarding compensation, the employer applies for certiorari. Affirmed.

George Lull, City Atty., Maurice T. Dooling, Jr., and Hugh L. Smith, all of San Francisco (Redman & Alexander, of San Francisco, of counsel), for petitioner.

A. E. Graupner and A. A. Tiscornia, both of San Francisco (W. H. Pillsbury, of San Francisco, of counsel), for respondents.

OLNEY, J. This is an application for a writ of certiorari annulling an award of the Industrial Accident Commission. The applicant is a municipal corporation, and had in its employ as a hospital steward in one of its hospitals a man named Ernest F. Slattery. While so employed, Slattery was taken with influenza on October 15, 1918, and died of that disease eight days later. His widow presented to the commission a claim for compensation for his death, and the commission made an award in her favor. The present application is to annul this award.

Two grounds are urged why the award is invalid. The first, and more important, is that the awarding of compensation for death by disease, the origin of which was not a bodily injury suffered through violence, is beyond the powers of the commission. The second is that there is no evidence to support the finding of the commission that the disease of which Slattery died was contracted in the course of his employment, and arose out of it.

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The decision on the first question presented turns on the meaning to be given to the word "injury" as used in article 20, § 21, of our Constitution. The section has been amended since Slattery's death, but at that time it read:

"The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for an injury incurred by the said employees in the course of their employment, irrespective of the fault of either party."

The word "injury" as so used means, of course, only bodily injury, and the position of the city is that it means only bodily injury suffered by or resulting from violence, while the position of the commission is that it it covers any harmful effect upon the body, whether by violence or by disease. The word is frequently used in both the broader and the more limited sense. In common usage, it has the more general meaning. Thus, Webster defines "injury" as: (1) "Any wrong, damage, or mischief done or suffered"; as (2) "a source of harm"; or as (3) "a wrong or damage done to another." On the other hand, when personal injuries are spoken of, there are apt to be meant only bodily injuries suffered through violence in some form or to some extent, traumatic injuries. The exact meaning of the word "injury" as used in Workmen's Compensation Acts, or in a similar connection, has come before the courts for consideration on numerous occasions, and their rulings are by no means harmonious. On the one hand, there are a number of cases holding that the word has the more limited meaning. An example of this is Linnane v. Ætna Brewing Co., 91 Conn. 158, 99 Atl. 507, L. R. A. 1917D, 77, where it was held that the injury or harm suffered by disease, and that compensation was not allowable for the death of an employee by pneumonia contracted as the result of unusual exposure and exhaustion in the course of his employment. Other examples along the same line are Industrial Accident Comm., etc., v. Brown, 92 Ohio, 309, 110 N. E. 744, L. R. A. 1916B, 1277; Adams v. Acme, etc., Co., 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283, Ann. Cas. 1916D, 689; Richardson v. Greenburg, 188 App. Div. 248, 176 N. Y. Supp. 651; Liondale, etc., Works v. Riker, 85 N. J. Law, 426, 89 Atl. 929.

On the other hand. there are a large number of decisions which adopt the broader meaning, and hold that compensation is allowable for the injury or harm done by disease, although the disease is not contracted as the result of any violence whatever in the ordinary sense of that word.

Under the English Workmen's Compensation Act, compensation is, or was allowable only for "personal injury by accident," a much more limited expression than that found in our constitutional provision, and one in which it might well be thought there was some implication of an injury by violent external means. Nevertheless, the House of Lords held in Brinton's v. Turvey, L. R. Ap. Cases (1905) 230, that compensation was allowable for the injury sustained by a workman from anthrax contracted by him in the handling of infected wool; there being no violence other than bacteria from the wool found their way into his system.

Similarly, it was held in Scott v. Pearson, L. R. 2 K. B. Div. (1916) 61, that compensation was allowable for cattle ringworm contracted by an employee by coming in contact, not violent, with infected calves.

Along the same line, the House of Lords held in Glasgow Coal Co. v. Welsh, L. R. 2 Ap. Cases (1916) 1, that a miner was entitled to compensation for rheumatism contracted by him as a result of his being required to stand for a number of hours in cold water to bale out the mine pit.

The Indiana Workmen's Compensation Act, like the English Act, allows compensation for "personal injury or death by accident." But in United Paperboard Co. v. Lewis (Ind. App.) 117 N. E. 276, compensation was allowed to a workman for acute nephritis contracted by him

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through his being required to work for several hours in heated paper pulp. The following portion of the opinion is pertinent here, the italics being ours:

"The courts have also differed as to whether a disease following an employment, should be considered an injury by accident within the meaning of such acts. In the various decisions on this subject it is generally recognized that diseases are of two classes: First, the so-called industrial or occupational diseases, which are the natural and reasonably to be expected results of a workman following a certain occupation for a considerable period of time; second, diseases which are the result of some unusual condition of the employment. The first class is illustrated by lead poisoning and the second by pneumonia following an enforced exposure. As a rule such industrial or occupational diseases are not considered as injuries by accident and in the absence of special statutory provision compensation is not allowed therefor. On the other hand, it is generally accepted that a *disease,* which is not the ordinary result of an employee's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, *is to be considered an injury* by accident, and comes within the provisions of acts providing for compensation for personal injury so caused [citing a long list of authorities]."

In Hurle's Case, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919, a workman employed to tend furnaces for making gas claimed compensation for the loss of his sight due to an acute attack of optic neuritis induced by poisonous gases from the furnaces to which his work constantly exposed him. The Massachusetts act allowed compensation for "personal injury" without requiring that it be by accident, and the question discussed by the court was as to whether the case was one of a "personal injury." The discussion concludes thus:

"The learned counsel for the insurer in his brief has made an exhaustive and ingenious analysis of the entire act touching the words 'injury' or 'injuries,' and has sought to demonstrate that it cannot apply to an injury such as that sustained in the case at bar. But the argument is not convincing. It might be decisive if 'accident' had been the statutory word. It is true that in interpreting a statute words should be construed in their ordinary sense. Injury, however, is usually employed as an inclusive word. The fact remains that the word 'injury,' and not 'accident,' was employed by the Legislature throughout this act. It would not be accurate, but lax, to treat the act as if it referred merely to accidents."

In State v. Trustees, 138 Wis. 133, 119 N. W. 806, 20 L. R. A. (N. S.) 1175, the widow and children of a policeman dying from pneumonia contracted by exposure in the course of his duty made application for a pension under a statute which provided for a pension to the dependents of a policeman "injured" in the performance of his duty. It was contended that by injury was not meant disease merely, and upon this point the court said (138 Wis. 135, 119 N. W. 807, 20 L. R. A. [N. S] 1175):

"The word 'injury,' in ordinary modern usage, is one of very broad designation. In the strict sense of the law, especially the common law, its meaning corresponded with its etymology. It meant a wrongful invasion of legal rights, and was not concerned with the hurt or damage resulting from such invasion. It is thus used in the familiar law phrase damnum absque injuria. In common parlance, however, it is used broadly enough to cover both the damnum and the injuria of the common law, and indeed is more commonly used to express the idea belonging to the former word, namely, the effect on the recipient in the way of hurt or damage, and we cannot doubt that at this day its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by any one. Hence, unless some reason to the contrary is presented, it should be so understood in these statutes. Subdivision 1, §

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4971, Stats. (1898). The respondent contends that, nevertheless, the word should be limited to the results of external violence. By itself the word 'injury' or 'injure' has no more application to the result of violence than to the result of any other injurious influence. A disease resulting from negligence of a physician in failing to give treatment is just as much an injury in common phrase as if it resulted from affirmative maltreatment or external violence."

The following cases, in none of which was the element of violence present, are along the same line: Alloa Coal Co. v. Drylie, 6 B. W. C. C. 398 (death by pneumonia); Hood v. Maryland, etc., Co., 206 Mass. 223, 92 N. E. 329, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379 (contracting of glanders); Dove v. Alpena, etc., Co., 198 Mich. 132, 164 N. W. 253 (death by anthrax); Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, Ann. Cas. 1918B, 293 (death by typhoid fever).

Finally there is the decision in this state in Hartford, etc., Co. v. Industrial Accident Commission, 32 Cal. App. 481, 163 Pac. 225, where an employee engaged in handling pulverized grain, and who contracted an affection of the nose and throat from the grain, was allowed compensation. The sole point discussed in the opinion, to be sure, is as to whether the disease was caused by the man's employment, but nevertheless it is a decision that cannot be justified unless the word "injury" is broad enough to include the harm done by disease.

[1] As between these two conflicting lines of decision it is not necessary to determine where the weight of authority lies, or which cases are the better reasoned. If those which give the broader meaning to the word "injury" do not lay down the better rule, they at least establish this, that it cannot be said that the broader meaning is an impossible or unreasonable one. The situation then, as it presents itself in connection with our constitutional provision, is at least that both by general usage and by the decisions of the courts the word "injury" may have either of two meanings, and that either is reasonable and possible. In such a situation, where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling. When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the Constitution. In Fargo v. Powers (D. C.) 220 Fed. 697, 709, it is said:

"If the constitutional provisions in question are susceptible of two constructions—one being that contended for by complainants, the other that taken by the Legislature—the action of the Legislature in adopting one of those constructions and enacting a statute carryig it into effect, as thus construed, must be deemed conclusive. That rule is: 'That the acts of a state Legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that reason. In case of doubt, every presumption, not clearly inconsistent with the language or subject-matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict.'

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"Where a statute has been adopted in carrying into effect a constitutional provision, the constitutional provision and statute must both be so construed as to permit the act to stand. This question was passed on in People v. Blodgett, 13 Mich. 151, 161, 162, where Judge Christiancy says: 'But it has been strenuously insisted here that these principles can only properly apply when the doubt exists as to the construction of the act, and not where it arises upon the meaning of a constitutional provision; that it is, in all cases the duty of the court first to fix and settle the meaning, definitely, of the Constitution, whatever may be their doubts upon it, and then to examine the act and apply it to the Constitution. Now, it strikes me, as a self-evident proposition, that the question whether a legislative act conflicts with the Constitution must, of necessity, equally involve the examination of both, and that, while it can make but little practical difference which is first examined and construed, the more logical order, when it is claimed that an act is unconstitutional, would be first to determine what the act is. Nor can I perceive any good ground for holding that the doubt which is to restrain us from pronouncing the act unconstitutional must be confined to the meaning of the act; nor why courts can be bound to settle, fix, and declare the meaning of the one, in spite of their doubts, more than of the other. The doubt which is to save the act is the doubt of the conflict; and this may arise alike from the construction of the one or the other, or both. In fact, it will be found that, in much the greater number of cases, where the rules above cited have been laid down, the doubts arise upon the construction of the Constitution, and not upon that of the act which was claimed to conflict with it.'

"In Board of Education v. State Board of Assessors, 133 Mich. 120, 94 N. W. 669, the question of the construction of this constitutional provision was before the court, which gave effect to the legislative construction, saying: 'But it is urged in behalf of the power exercised by the board in this case that, if the act is subject to this construction, it is in conflict with the constitutional amendment itself. In determning this question, under well-settled rules, we are not to ignore the contemporaneous construction placed upon the amendment by the Legislature itself.' Kennedy v. Gies, 25 Mich. 92; Pfeiffer v. Board of Education, 118 Mich. 564, 77 N. W. 250, 42 L. R. A. 536."

See, also, County of Tulare v. County of Kings, 117 Cal. 195, 49 Pac. 8; Railroad Commissioners v. Market Street Ry. Co., 132 Cal. 677, 64 Pac. 1065.

In the present case, the Legislature has construed the Constitution, and has placed upon the word "injury" the broader meaning possible to it. Section 6 of the Workmen's Compensation Act (St. 1917, p. 831) provides that compensation shall be given by an employer "for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death." Subdivision 4 of section 3 of the act defines injury as follows:

"4. The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment. In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury."

[2, 3] The Constitution cannot be given the more limited meaning contended for by the city without declaring this provision in the statute void. This we cannot do, unless there is a plain and unmistakable conflict between the statute and the Constitution. But there is no such plain and unmistakable conflict, since the statute does no more than adopt what is at least a possible and not unreasonable construction of the Constitution. This being the case, it must be held that the provision of the Compensation Act, whereby a disease arising out of employment is declared

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to be an injury for which compensation shall be paid, is not unconstitutional, but is operative and controlling.

As to the second contention of the city, that Slattery did not contract the influenza from which he died because of his employment, the facts relied upon in its support are that an epidemic of the disease was raging in the city at the time, that the disease is highly infections, and was so general that one out of every ten in the city contracted it, and that every member of the community was exposed to it to a more or less extent. The existence of these facts cannot be doubted, and from them it is argued that it cannot be said with any reasonable certainty that Slattery contracted the disease because of his employment as hospital steward, even though he was handling influenza cases. It is also contended, and truly, that compensation is not due merely for injury by disease contracted by an employee, while employed. The injury must be one arising out of the employment, and where the injury is by disease there must exist the relation of cause and effect between the employment and the disease. It is also true that to justify an award there must be an affirmatively showing of a case within the statute or, concretely, it must affirmatively appear here that Slattery contracted the disease from which he died because of his employment.

On the other hand, the evidence showed that the incubation period of the disease is from one to four days, that Slattery in the course of his duties during the five days preceding his being taken ill had to handle and had been exposed to at least 12 developed cases of influenza, that so far as known he was not exposed to any cases except in the course of his employment, that he lived only half a block from the hospital where he was employed, and during the two weeks preceding his illness had been working very hard, and had gone directly from his home to work and from his work to his home, and had not been out, that his exposure because of his work was far greater than that of the average person, and that among the nurses in the hospitals of the city, a class exposed in much the same degree as Slattery, the proportion who contracted the disease ran from 50 to 85 per cent. as against 10 per cent. for the community in general. The preponderance of the medical testimony also was to the effect that Slattery contracted the disease as a result of his peculiar exposure to it incidental to his employment.

[4] It, of course, cannot be said that from these facts it is certain that Slattery contracted his sickness because of his employment. But certainty is not required. It is not even required that the award be, in our judgment in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did. This we cannot say in the present case.

If there had been no epidemic in San Francisco at the time, and it appeared that Slattery as hospital steward had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period of incubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic was raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was Slattery, the question of whether he was attacked because of the exposure incident to his employment or because of the exposure general to the public would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that of person exposed as was Slattery the proportion of those attacked was from five to eight times as great as the proportion of

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those not so exposed. This ratio is so great that it cannot be said that the commission was not justified in concluding from it, in connection with the other facts, that Slattery's illness was due to the peculiar exposure of his employment. Its conclusion is the more justified by the fact that it coincides with the conclusions of most of the physicians who testified. Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread, and to draw conclusions from their observations.

Award affirmed.

We concur: Angellotti, C. J.; Shaw, J.; Lawlor, J.; Lennon, J.; Wilbur, J.. Sloane, J.

CONTINENTAL CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 3251.)

(District Court of Appeal, Second District, Division 1, California. May 6, 1920.)

190 Pacific Reporter 849.

1. MASTER AND SERVANT—ACCIDENT "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT DEFINED.

Accidents "arising out of the employment" within the Workmen's Compensation Act are those in which it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business exposes the employee, and they must result from a risk reasonably incident to the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—ACCIDENT DURING VACATION HELD NOT ONE "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where a sales' manager while spending his vacation at a ranch went by horseback to a post office to answer a military questionnaire, and was thrown from his horse and injured while riding over a trail in returning after writing and mailing a reply to a business letter from his employer received at the ranch, the injury was not the result of an accident arising out of his employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Proceedings by Grey M. Skidmore under the Workmen's Compensation Act (St. 1917, p. 831) to obtain compensation for personal injuries, opposed by the Golden State Portland Cement Company, the employer, and the Continental Casualty Company, insurer. There was an award of compensation by the Industrial Accident Commission and the Casualty Company brings certiorari. Award annulled.

Jos Crider, Jr., of Los Angeles, for petitioner.
A. E. Graupner, of San Francisco, for respondents.

SHAW, J. In this proceeding upon writ of review we are asked to annul an award of compensation made by the Industrial Accident Com-

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mission to Grey M. Skidmore for injuries alleged to have been sustained while employed as sales manager by the Golden State Portland Cement Company, of which company petitioner was the insurer.

Petitioner attacks the award upon the ground that the evidence is insufficient to sustain the finding of the commission that the injury to Skidmore as such employee arose out of and in the course of his employment.

In September, 1918,, Skidmore, accompanied by his family, went from his home in Los Angeles county to a mountain ranch of a relative in Northern California, located some five miles from a railway station and post office, known as Island Mountain, to spend a week or more in hunting, horseback riding, and like diversion, as a vacation. He arrived at the ranch on September 25th, and on the two following days, free from any duties to his employer, engaged with marked success in hunting deer and other game abounding in the vicinity. On September 26th he received a letter from his employer, dated September 23d, pertaining to a request made by a customer for an adjustment of freight upon a bill of goods sold him, and which it was claimed Skidmore had agreed to grant, as to which Skidmore made reply the same day; but, having learned that some mail, among which was his quetionnaire, awaited him at Island Mountain, he held his letter unsealed, and on the morning of September 27th, took his rifle, and, by horseback, following a trail representing a shorter route to the station and along which game was plentiful, went to Island Mountain, to which place his wife, accompanied by his uncle, proceeded in a vehicle over the road. Upon arriving at the station he received another letter from his employer, dated September 26th, containing information of general interest as to the progress of the business, but nothing calling for answer, though at the station, in finishing his letter in reply to that of September 23d, he made such comments and suggestions as might be expected from a sales manager on his vacation, referred to his success in hunting, and ended his letter by saying "am riding down to the station horseback five miles to fix up my questionnaire." After answering the questionnaire, he assisted his uncle in loading some grain and then went to his horse, which he mounted to return to the ranch, when he was thrown therefrom and his leg broken.

[1, 2] It thus appears that the accident occurred at a time when Skidmore was relieved from duty as an employee of the Golden State Portland Cement Company and while he was engaged in the diversions incidental to the vacation granted him, among which was horseback riding and hunting. His time was his own, to use as he pleased. His purpose in going to the station, as stated by him in his letter, was to answer his questionnaire. For his own diversion he went horseback, and, since deer were plentiful along the trail, he took his rifle. The mailing of the letter to his employer was a mere incident of the trip; but, conceding the writing and mailing of the letter was within the scope of his employment, he was not injured while engaged in such act, but afterwards, and when, upon his own time, free from any duties to his employer, he had engaged in the diversions of his vacation. Gernhardt et al. v. Industrial Accident Commission of California, 185 Pac. 307. He is no more entitled to under the law to claim compensation from his employer for the injury which happened to him in thus returning to the ranch than he would have been had it occurred while he was traveling from his home in Los Angeles, to the place where his vacation was to be spent. "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. Coronado Beach Co. v. Pillsbury et al., 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164. There was nothing in the nature of Skidmore's duties to

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his employer which required him to ride horseback over this trail, carrying a rifle, in traveling from the station back to the ranch; and hence it is impossible to trace the injury to the nature of the employee's work or the risks to which the employer's business exposed the employee as its sales manager. Ward v. Industrial Accident Commission, 175 Cal. 42, 164 Pac. 1123, L. R. A. 1918A, 233. The nature of his employment was not such as to expose him to the dangers incidental to the means adopted for his pleasure while on his vacation, and could not have been contemplated in connection with the employment. McNichol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

In our opinion, the injury sustained did not arise out of the employment, which fact must be made to appear in order to entitle an employee to compensation.

The award is annulled.

We concur: Conrey, P. J.; James J.

INDUSTRIAL COMMISSION et al. v. FUNK. (No. 9751.)

(Supreme Court of Colorado. June 7, 1920. Rehearing Denied July 6, 1920.)

191 Pacific Reporter 125.

1. MASTER AND SERVANT—INJURY TO EMPLOYEE DISOBEYING SAFETY ORDER HELD ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Death of employee engaged in mining from an open pit on the fall of overhanging bank *held* the result of an accident arising out and in the course of the employment within Workmen's Compensation Act, though employee had been ordered not to work under overhanging bank without first causing it to be caved off; such order being one dealing only with employee's conduct without limiting his sphere of employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—COMPENSATION HELD SUBJECT TO REDUCTION FOR DISOBEDIENCE OF SAFETY RULE; "REASONABLE RULE FOR SAFETY OF EMPLOYEES."

Disobedience by employee engaged in mining silica from open pit of employer's order not to work in pit without causing the overhanging bank to be caved off *held* a violation of a "reasonable rule * * * for the safety of the employees," within Workmen's Compensation Act 1915, § 61, providing that compensation may be reduced 50 per cent. for such violation.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

3. MASTER AND SERVANT—"CASUAL" EMPLOYMENT WITHIN COMPENSATION ACT DEFINED.

That employment is not for any specified length of time, or that injury occurs shortly after employee begins work, does not make the

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employment "casual" within Workmen's Compensation Act, § 4 (e) II, making the act inapplicable to an employee whose employment is but "casual."

(For other cases, see Master and Servant, Dec. Dig. § 362.)

(For other definitions, see Words and Phrases, First and Second Series, Casual.)

4. MASTER AND SERVANT—BRICK MANUFACTURER'S EMPLOYEES MINING SILICA HELD NOT "CASUAL" EMPLOYEES WITHIN COMPENSATION ACT.

Where brick manufacturer owned and regularly operated in connection with his brick business a silica bed, employes engaged in the mining of the silica were not engaged in a "casual" employment within Workmen's Compensation Act, § 4 (e) II, making the act inapplicable to person whose employment is "casual."

(For other cases, see Master and Servant, Dec. Dig. § 362.)

5. MASTER AND SERVANT—EMPLOYER HELD WITHIN COMPENSATION ACT THOUGH LESS THAN STATUTORY NUMBER OF EMPLOYEES WORK AT SAME PLACE; "IN OR ABOUT SAME PLACE OF EMPLOYMENT"; "COMMON EMPLOYMENT."

Brick manufacturer who operated a silica bed in connection with his brick business, and who employed more than four employees, was liable for compensation for death of silica miner, under Workmen's Compensation Act, though fewer than four employees were engaged at the silica bed, notwithstanding section 4 (d) III, making the act inapplicable to employers of less than four employees "in or about the same place of employment," the silica miners being engaged in a common employment with the employees working in the brick yard, and the act being applicable in view of section 4 (d) II, if four or more persons are regularly employed in the same business or in "common employment," even though fewer than four are employed at the particular place where accident occurred; citing 1 Words and Phrases (Second Series) p. 808.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Common Employment.)

Denison and Burke, JJ., dissenting.

En Bank.

Error to District Court, Yuma County; L. C. Stephenson, Judge.

Proceedings under the Workmen's Compensation Act 1915 by Fannie Gaines for compensation for death of her husband, Sam Gaines, opposed by Martin D. Funk, doing business as the Wray Brick Company, employer. Award for claimant by the Industrial Commission of Colorado was set aside by the district court, and the commission and claimant bring error. Reversed and remanded, with directions.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen. (H. E. Curran, of Denver, of counsel), for plaintiffs in error.

M. M. Bukeley, of Wray, and Wayne C. Williams, of Denver, for defendant in error.

ALLEN, J. This cause is one brought and prosecuted under the provisions of the Workmen's Compensation Act. On June 14, 1916, Sam Gaines and Wililam Gaines, father and son, respectively, were, as the result of an accident, killed while in the employ of Martin D. Funk, doing

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business as the Wray Brick Company. On August 26, 1918, the Industrial Commission, after due proceedings and a hearing, awarded certain compensation to one Fannie Gaines, the widow of Sam Gaines, deceased, as his dependent during his lifetime. Thereafter Martin D. Funk, the employer and who had been ordered to pay such compensation, filed a petition for rehearing, and the same was, on September 30, 1918, denied by the commission. On November 18, 1918, Funk commenced an action in the district court of Yuma county to set aside the order and award of the commission, and on November 5, 1919, the district court set aside the order and award. The Industrial Commission, and Fannie Gaines, as claimant of compensation, bring the cause here for review.

The record presents three main questions of law for our determination, namely:

(1) Did the accident, which caused the death of Sam Gaines and William Gaines, arise out of and in the course of the employment of the decedents?

(2) Was Sam Gaines, at the time of the accident, an employee, within the meaning of the Workmen's Compensation Act, who or whose dependents would be entitled to compensation under the act?

(3) Was Martin D. Funk such an employer as to be or to become subject to the provisions of the Workmen's Compensation Act,

It is plain from the provisions of the Workmen's Compensation Act, and it is not controverted, that, if any one or more of the foregoing questions must be answered in the negative, no compensation was allowable to any one, and the order and award of the commission cannot be upheld. The district court set aside the order and award on grounds which are the equivalent of answering the first two questions in the negative.

Relevant to the first question, the findings of the commission, which are supported by the evidence, are as follows:

"That at the date of their death, they (Sam Gaines and William Gaines) were employed by the said Martin D. Funk, doing business as the Wray Brick Company, in mining silica from an open pit or bank then owned and operated by the said Martin D. Funk in connection with with his brick business in the city of Wray, Colo. That while so employed and engaged in mining silica under the bank, the top caved off, completely covering the said William and Sam Gaines and causing almost instant death. * * *

"That from the evidence produced at said hearing the commission finds that the said Sam Gaines was guilty of violating a reasonable safety rule, in this: That the said Martin D. Funk has specifically ordered and directed that the said Sam and William Gaines were not to work under the overhanging silica bank without first causing the same to be caved off. That the said Sam and Williams Gaines had not caved off the top of the silica bank as directed, and that, in accordance with the Workmen's Compensation Law, compensation or death benefits should therefore be reduced 50 per cent."

Whether it is to be held that the accident arose out of and in the course of the employment depends upon the consequences which we find result from the disobedience of the order or direction, mentioned in the findings.

In 1. Honnolds on Workmen's Compensation, p. 390, § 113, the author says:

"Disobedience to an order or breach of a rule is not of itself sufficient to disentitle a workman to compensation, so long as he does not go outside the sphere of his employment. There are prohibitions which limit the sphere of employment, and prohibitions which deal only with conduct within such sphere. A transgression of a prohibition of the latter class

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leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

[1] In the instant case, it should be noted that the commission found that the workman was directed "not to work under the overhanging silica bank without first causing the same to be caved off." It is thus seen that the workman was not prohibited working at all on the silica bank in question, but was instructed to cave off the top before commencing the work of mining at that particular place. The order related to the manner in which that particular section of the silica bank was to be worked. The order, therefore, dealt only with the conduct of the workman within his sphere of employment, and did not limit such sphere. Under the rule above quoted from Honnold, which we regard as correct, the violation of the order or direction involved in this case did not make the accident one arising out of and in the course of the employment, and it cannot therefore be held that the deceased were not within the scope of their employment at the time of the accident.

[2] The commission regarded the disobedience of the order as a violation of "a reasonable safety rule," and for that reason reduced the compensation 50 per cent., under section 61 of the Workmen's Compensation Act of 1915 (Laws 1915, p. 551), which provides for such action "where injury results from employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." We agree with the commission's conclusion that the order in question was a safety rule, within the meaning of the act. With reference to the direction, the employer testified:

"I told them that the bank was safe here and here (pointing) and here not to take any more out unless he caved it down from the top. while it might stand if left alone, if they dug any further it might cave on them."

It is also plain from the section last cited (section 61, c. 179, S. L. 1915) that a willful violation of a safety rule does not defeat compensation, but only reduces it 50 per cent.

The defendant in error, the employer and respondent in the proceedings before the commission, contends, with reference to the second question presented in this case, that Sam Gaines was not such an employee as would be entitled to compensation under the act, or whose dependents would be so entitled. In this connection it is insisted that William and Sam Gaines were "casual" employees, and reliance is placed upon section 4 (e) II of the act, where it is provided that the term "employee" shall not include "any person whose employment is but casual."

[3, 4] The evidence shows that the employer was in the business of manufacturing brick. The silica bed upon which the employees worked was operated in connection with such business, and for the purpose, at least among others, of furnishing material used in the manufacture of brick. The work of Sam and William Gaines, performed at the silica mine, was therefore in the usual course of the business of the employer. Such service was not merely incidental to the business, nor occasional. The mining of silica was carried on continuously, or at least with regularity. The employees at the mine were employed to do a particular part of a service recurring somewhat regularly, with the fair expectation of the continuance for a reasonable time. It does not render an employment casual that it is not for any specified length of time, or that the injury occurs shortly after the employee begins work. Under the facts above stated, and the principles announced, we conclude that Sam and William Gaines were not casual employees, within the meaning of the statute. See 1 Honnold on Workmen's Compensation, § 62, p. 199 et seq., and cases cited in the notes; also, section 43, p. 51, Corpus Juris treatise on Workmen's Compensation Acts, and notes.

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As to the third main question, hereinbefore referred to in this opinion, the contention of the employer, defendant in error here, is to the effect that he, Martin D. Funk, was not, at the time of the accident, such an employer as is subject, without his election, to the provisions of the Workmen's Compensation Act. In this connection, defendant in error relies upon section 4 (d) III of the act, which reads as follows:

"III. This act is not intended to apply to employers of private, domestic servants or farm or ranch labor; nor to employers who employ less than four employees regularly in the same business, or in or about the same place of employment; provided, that any such employer may elect to accept the provisions of this act, in the manner provided herein, in which event he and his employees shall be subject to and entitled to all the provisions of this act."

The particular part of this section upon which the defendant in error specially relies is the expression "in or about the same place of employment," and it is argued that the employer in the instant case is not subject to the act, because less than four persons were engaged in performing services at the pit or bank of silica, where Sam and William Gaines were working; in other words, it is contended that the act does not apply to the defendant in error simply because he employed less than four persons at the particular place of employment where the accident occurred.

[5, 6] Under the construction which the defendant in error apparently places upon the Workmen's Compensation Act, and particularly section 4 (d) III thereof, an employer would be subject to the act only as to those employees who work at a place where four or more persons are working, under employment, and would not be subject to the provisions of the act as to those employees who perform services at some particular place, appurtenant to the employer's business, at which less than four persons are working. Such a construction of the statute cannot be upheld. It readily appears from other sections of the act that, if an employer is subject to its provisions, he is subject as to all employees engaged in a common employment, even if a particular group of less than four of them are performing services at some one place. It may be that section 4 (d) III, considered literally, to some extent supports the contention of the defendant in error; but, if so, it is inconsistent with other sections of the act. In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent. 36 Cyc. 1130.

The intent of the Legislature as to who shall be deemed to be employers, subject to the provisions of the act or within the meaning of the act, is expressed in section 4 (d) II, where it is provided that—

"The term 'employer' shall mean and include: * * * II. Every person, association of persons, firm and private corporation (including any public service corporation), * * * who has four (4) or more persons regularly engaged in the same business or employment, (except as otherwise expressly provided in this act)."

Subdivision III of this section, which is relied on by the defendant in error, does not say who shall be deemed to be employers, but rather who shall not, and its main purpose is to provide that the fact shall not apply to employers of private, domestic servants, or farm and ranch labor, unless such employers elect to accept the provisions of the act.

That the intent of the Legislature was to bring under the act those employers who have four or more persons regularly engaged in the "same business or employment," as provided in section 4 (d) II, instead of limiting the application of the act to those having such number of persons "in or about the same place of employment," according to the expression section 9, subd. II, which reads, in part, as follows (italics ours):

"II. On and after August 1, 1915, every employer of four or more employees, not including private domestic servants and farm and ranch laborers, *engaged in a common employment,* shall be conclusively pre-

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sumed to have accepted the provisions of this act. * * * Any employer commencing business subsequent to August 1, 1915, may make his election not to become subject to the provisions of this act at any time prior to becoming an employer of four or more employees, *in a common employment.* * * *

Considering together the various sections and subsections above referred to, they must be held to provide that an employer is subject to the provisions of the act, without his election, if he employ four or more persons in the same business, or if he is an employer of "four or more employees engaged in a common employment."

It seems clear that the manufacture of brick, in the sense that material is made in to brick, and the procuring of material to be used in such manufacture, together constitute but one business or employment.

The commission found, and the evidence supports the finding, that the silica mine was operated by Funk "in connection with his brick business in the city of Wray." The evidence shows that the employer operated a brick manufacturing plant and brick yard in Wray, and that about 20 per cent. of the volume of material mined from the silica bed or bank operated by Funk, and at which Sam and William Gaines were working, was used by him in the manufacture of brick at such plant or yard. The evidence shows, and it is not disputed, that more than four persons were employed by Funk in his business which involved the manufacture of brick and the mining of silica used in such manufacture. Those mho were mining silica and those working in the brick yard at Wray were each and all together engaged in a common employment, within the meaning of the expression "common employment," as used in the Workmen's Compensation Act. The reason is that the purpose of the work of each was a common one; they were working to accomplish the same general end, the manufacture of brick. See definitions of "common employment" in 1 Words and Phrases (2d Series), p. 808.

Under the views expressed in this opinion, there is no ground shown in the record upon which the order and award of the Commission should be set aside. For the reasons above indicated, the judgment of the district court is reversed, and the cause is remanded, with directions to affirm the order and award of the Industrial Commission.

Reversed.

Denison and Burke, JJ., dissent.

FRANK v. DEEMER STEEL CASTING CO.

(Superior Court of Delaware. New Castle. June 4, 1920.)

110 Atlantic Reporter, 561.

MASTER AND SERVANT—COMPENSATION FOR INJURIES HELD PROPERLY REDUCED.

The Industrial Accident Board *held* justified by the evidence and to have authority under Workmen's Compensation Law, § 133, to order injured employee to return to work for employer at wages offered, and under section 103, subsec. "b," to reduce compensation under the law to half the difference between wages earned before injury and those thereafter offered.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Rice and Heisel, JJ., sitting.

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William H. Cooper, of Wilmington, for appellant.
Herbert H. Ward, of Wilmington, for appellee.

Proceedings under the Workmen's Compensation Act before the Industrial Accident Board (No. 9131, March 17, 1920), by Deemer Steel Casting Company, employer, against Mike Frank, employee, for review of agreement between the parties as to compensation for injuries sustained by Frank. The industrial Accident Board diminished the compensation, previouly agreed upon, and the employee appeals.

Award on review affirmed.

At the time Frank was injured and for which he is receiving weekly compensation he was employed as an ordinary laborer about the plant of the appellee company.

This is an appeal by Mike Frank from the award made on review by the Industrial accident Board diminishing his weekly compensation previously agreed upon. The case originally came before the Industrial Accident Board, October 14, 1919, for commutation of the then present value of the compensation agreed upon, to wit: $10.50 per week based on an average weekly wage of $21.00 per week, etc. The board made the commutation prayed for. From the award the Deemer Steel Casting Company appealed to the Superior Court for New Castle County, and on December 13, 1919, the court reversed the award, holding that the board erred in classifying Frank's injuries and in commuting the weekly payments agreed upon. Deemer Steel Casting Co. v. Mike Frank, 7 Boyce. ——, 108 Atl. 283.

Subsequently, February 19, 1920, the Deemer Steel Casting Company petitioned the Industrial Accident Board to review the compensation agreed upon on the ground that the incapacity of the injured employee had diminished. At the hearing the company offered to take Mike Frank back in its employment, and give him steady work at the rate of twenty-five cents per hour for fifty-two and one-half hours per week. The president of the company testified among other things:

"I told him [Mike Frank] after he was hurt that at any time he got so he wanted to work we would give him something to do around the plant at twenty-five cents an hour picking up nails or scrap out of the sand for fifty-two and one-half hours per week, at which he would be permanently employed. * * *" That Mike Frank could earn the amount they offered to pay him.

Dr. McEntee testified that Frank was able to do the work offered to him. Counsel for Frank made application for a continuance of the case which the board refused to grant unless it could be shown that Frank was not able to do the kind of work offered. It was contended for Frank that the fact of the offer of the company to take him back in its employment and pay him for such work as he was able to do about its plant did not, in itself, establish the earning power of Frank, and that he should be allowed to introduce evidence as to his general earning power.

The board made the following informal order, dated the seventeenth day of March, 1920:

"Mike Frank is ordered to go back to work next Monday with Deemer Steel Casting Company, and compensation is to be paid up to and including Sunday, March 7. Thereafter and while he is in the employ of Deemer Steel Casting Company at a wage of thirteen dollars and twelve and one-half cents per week, the compensation payable to Mike Frank shall be fifty per centum of the difference between twenty-one dollars per week, wages earned at and prior to the date of injury and thirteen dollars twelve and one-half cents, the amount at which he goes to work, or three dollars ninety-four cents per week, and a formal order shall be made to this effect."

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And also made the following formal order:

"(1) That the payment of compensation heretofore ordered to be paid to Mike Frank at the rate of ten dollars fifty cents per week be terminated as of March 7, 1920; (2) that from the period beginning March 8, 1920, and until otherwise ordered by this board, or terminated by 'the Delaware Workmen's Compensation Law of 1917,' as amenedd, compensation should be paid by Deemer Steel Casting Company to Mike Frank at the rate of three dollars ninety-four cents per week."

PER CURIAM. The court believe it is not necessary to determine the general earning power of the injured employee in cases where work is offered suitable to his capacity, by the employer, for the reason that under section 3193nn, Code 1915, section 133 of the Delaware Workmen's Compensation Law of 1917, as amended, it is provided:

"If an injured employee refuses employment suitable to his capacity, procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Accident Board, such refusal was justifiable. * * *"

Section 103, subsec. "b," of the act provides:

"For disability for work partial in character (except the particular cases mentioned in the next succeeding subsection [c] of this section), fifty per centum of the difference between the wages received by the injured employee before the injury and the earning power of the employee thereafter, but such compensation shall not be more than fifteen dollars per week. This compensation shall be paid during the period of such partial disability for work, not, however, beyond two hundred and eighty-five weeks. Should total disability for work be followed by partial disability for work,the period of two hundred and eighty-five weeks mentioned in this subsection (b) shall be reduced by the number of weeks during which compensation was paid for such total disability."

We think that the Industrial Accident Board was justified by the evidence and had the power and authority under section 133 to order Mike Frank. the claimant, to go to work for the Deemer Steel Casting Company, at the employment procured which was suitable to his capacity for work, and under section 103, subsec. "b" to make an order reducing his compensation from ten dollars fifty cents per week to three dollars ninety-four cents per week, until otherwise ordered by said board or terminated by the Delaware Workmen's Compensation Law of 1907, as amended.

For the reasons stated, the award and order of the said board is in all things affirmed; and it is ordered that a copy of this decision be filed with the prothonotary of this court, and that the prothonotary shall file a certified copy thereof with the Industrial Accident Board.

It is further ordered that the costs of this appeal be taxed against the Deemer Steel Casting Company, the appellee.

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STOKES v. MORRIS & CO. (No. 22533.)

(Supreme Court of Kansas. July 10, 1920.)

191 Pacific Reporter 264.

(Syllabus by the Court.)

MASTER AND SERVANT—NEW TRIAL HELD WARRANTED ON GROUND THAT CLAIMANT WAS NOT ENTITLED TO COMPENSTION AS WIFE.

A woman, who claimed to be the wife and sole dependent of a deceased workman, recovered judgment for his death against his employer under the Workmen's Compensation Act. The woman died, and after her death the judgment was revived in the name of her administrator and that of the deceased workman, and the administrator and guardian of a minor child of the deceased was substituted for the plaintiff. On a motion for a new trial, it was shown that the plaintiff was not the wife of the deceased workman, that another woman then living was his wife, and the plaintiff had knowledge of that fact. *Held,* that the judgment should have been set aside, and that a new trial should have been granted.

(For other cases, see Master and Servant, Dec. Dic. § 411½, New, vol. 5A Key-No. Series.)

Appeal from District Court, Wyadnotte County.

Action by Lillie Stokes, as widow of Major Stokes, deceased employer against Morris & Co., employer. Judgment for plaintiff, and after her death action was revived in the name of Earl R. Gilbert, public administrator and administrator of Lillie Stokes and Major Stokes, and as administrator and guardian of Ralph Stokes. Motion for new trial on the ground of newly discovered evidence denied, and defendants appeals. Reversed, and new trial granted.

C. W. Trickett, of Kansas City, Kan., for appellant.

McCanles, Thompson & Gorsuch, of Kansas City, Mo., for appellee.

MARSHALL, J. The defendant appeals from a judgment against it under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942). Major Stokes was injured November, 1917, while he was an employee of the defendant, and according to the verdict of the jury died as a result of that injury. The plaintiff brought the action as the widow of Major Stokes. The defendant came within the operation of the Workmen's Compensation Act.

The serious question presented arises out of the order overruling the defendant's motion for a new trial. One of the grounds of that motion was newly discovered evidence material to the defendant, which it could not with reasonable diligence have ascertained and produced at the trial. The newly discovered evidence tended to show that the plaintiff was not the wife of Major Stokes at the time of his injury and death. An agreed statement of facts filed on the hearing of the motion for a new trial recited that Major Stokes was married to Lillian Wembly, another woman, January 9, 1909; that in February, 1918, he filed an action for divorce against his wife, Lillian Stokes, formerly Lillian Wembly, but that action had not been tried, nor disposed of, but was pending, on the date of the death of Major Stokes, June 28, 1918; that Major Stokes and his wife, Lillian Wembly Stokes, separated, and that after such separation the plaintiff and Major Stokes lived together when the plaintiff took the name Stokes, and afterwards went by that name. The affidavit of Lillian Wembly Stokes was filed, in which she stated that she was married to

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Major Stokes at Newton, Kan., and was the mother of Ralph Stokes and Homer Stokes, children of Major Stokes; that Major Stokes never got a divorce from her; and that he and she were husband and wife until his death. The affidavit of the attorney who filed the petition for a divorce for Major Stokes was presented, and it tended to prove that the plaintiff, Lillie Stokes, knew that Major Stokes had a living wife.

The evidence produced was sufficient to establish the fact that the plaintiff was not the w fe of Major Stokes at the time of his death. If she was not his wife, and he had a wife living at that time, the plaintiff cannot recover compensation in this action for herself or for the dependent members of the family of Major Stokes. Part of the statute under which the plaintiff seeks to recover reads:

" 'Dependents' means such members of the workman's family as were wholly or in part dependent upon the workman at the time of the accident. 'Members of a family,' for the purpose of this act, means only widow or husband, as the case may be, and children." Laws 1917, c. 226, § 2, subd. (j).

If the evidence produced on the motion for a new trial was true, the plaintiff was not the wife of Major Stokes at the time of his injury and death, and was not then a member of his family within the meaning of the Workmen's Compensation Act. She cannot recover compensation as the wife of Major Stokes; neither can she recover in any other capacity, because she does not come within any of the provisions of the act. Ellis v. Coal Co., 100 Kan. 187, 163 Pac. 654, supports this conclusion. See, also, Armstrong v. Industrial Commission, 161 Wis. 530, 154 N. W. 844; Hall v. Industrial Commission, 165 Wis. 364, 162 N. W. 312, L. R. A. 1918D, 829. 1 Honnold on Workmen's Compensation, § 75, and notes.

The plaintiff cites authorities which hold that a woman who innocently lives with a man whom she believes to be her husband, but who has a wife living, can recover compensation. We have two difficulties in following these authorities, the first of which is our statute, of which a part has been quoted, and the second of which is that in the present case the evidence tended to show that the plaintiff knew that Major Stokes had a wife living.

After judgment was rendered in this action, the plaintiff died, and the action was revived in the name of Earl R. Gilbert, public administrator and administrator of the estates of Lillie Stokes and of Major Stokes, and Earl R. Gilbert, as such administrator and as guardian of Ralph Stokes, was substituted for the plaintiff. It is argued that the substitution was proper and avoided the consequences of a judgment having been wrongfully obtained in favor of the plaintiff. It is also argued that the defendant has waived its right to object to the substitution by filing its motion for a new trial instead of objecting to the substitution. It is further argued that a defect of parties or a want of proper parties cannot be presented or reached by a motion for a new trial. The fault in this argument lies in the fact that the judgment was improperly obtained, that the plaintiff had no right of action, and that the defendant may have valid defenses against all parties for whose benefit a judgment might be obtained. On the showing made, a new trial should have been granted, and the defendant should have been permitted to set up any defense that it may have against the substituted party and against those for whose benefit a judgment might be obtained by the substituted party.

The judgment is reversed, and a new trial is granted.

All the Justices concurring.

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HARDIN v. HIGGINS OIL & FUEL CO. (No. 22682.)

(Supreme Court of Louisiana. May 31, 1920.)

85 Southern Reporter 202.

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT—EMPLOYEE COMPENSATED FOR LOSS OF FINGER CANNOT RECOVER FOR TEMPORARY TOTAL DISABILITY.

An employee who has lost a finger other than the index finger and who has received half wages for 20 weeks, the compensation for such loss fixed by Employers' Liability Act,§ 8 , subsec. "d," as amended by Act No. 243 of 1916, is not entitled to compensation for temporary total disability under subsection "a" of said section.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

2. MASTER AND SERVANT—EVIDENCE HELD INSUFFICIENT TO SHOW PERMANENT PARTIAL DISABILITY WITHIN COMPENSATION ACT.

Evidence *held* insufficient to prove that employee was suffering with a permanent partial disability, beyond the loss of one finger for which he had received compensation by reason of stiffness of two other fingers so as to entitle him to compensation, under Employers' Liability Act, § 8, subsec. "c,' as amended by Act No. 243 of 1916.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Action by Van D. Hardin against the Higgins Oil & Fuel Company. Judgment for plaintiff, and defendant appeals. Reversed, and action dismissed.

J. S. Atkinson, of Shreveport, for appellant.
Barret & Files, of Shreveport, for appellee.

SOMMERVILLE, J. Plaintiff alleged that while in the employ of the defendant company he received injuries to his hand, necessitating the amputation of his middle finger, and permanently injuring and crippling two other fingers, which rendered his hand permanently useless; that during the course of his employment,through the negligence and carelessness of the defendant company, he was totally disabled for 23 weeks, and permanently partially disabled thereafter, and he asks for judgment in the sum of $230 for total disability, with a credit of $200 paid thereon by defendant, and for the further sum of $2,770 for permanent partial disability. (The last claim for injuring and crippling two fingers is more than the compensation allowed in the act for the loss of a hand, say $10 per week for 150 weeks.)

Defendant answered, and admitted that plaintiff, while in its employ, received injuries to the middle finger of his hand, which finger was amputated, but specially denied that he received any other injuries to his hand, or any injuries permanently injuring and crippling two other fingers; further, it denied that his hand had been rendered useless by reason of the injury sustained, and alleged that it had paid plaintiff the sum of $200, being $10 for 20 weeks, for injury to his middle finger and the loss of same. It denied that plaintiff had sustained other injuries to his hand or fingers.

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There was judgment in favor of plaintiff for $230, being $10 per week for 23 weeks during total disability of the plaintiff to do any work, less $200 paid on account, and in the further sum of $1,050, being $3.50 per week for 300 weeks for "total disability." Defendant has appealed.

That portion of plaintiff's claim "for total disability," $230, was apparently made under section 8 ,subsec. (a), of the Compensation Act No. 20 of 1914, p. 44, as amended by Act No. 243 of 1916, p. 512. It provides:

'(a) For injury producing temporary total disability to do work of any reasonable character fifty per centum of wages, subject to a maximum compensation of ten dollars per week and a minimum compensation of three dollars per week," etc

But we find in subsection (d) it is provided:

"In cases included by the following schedule the compensation shall be as follows: * * * For the loss of a first finger, commonly called the index finger, fifty per centum of wages during the thirty weeks.

"For the loss of any other finger, or a great toe, fifty per centum of wages during twenty weeks," etc.

[1] And, as plaintiff's suit is brought under this act, and he has lost one of his fingers, other than the first finger, he is only entitled to half wages for 20 weeks; and this amount he admits he has received from defendant company. He has no claim under subsection (a), which provides for temporary total disability.

[2] Plaintiff's claim for $2,770 "for permanent partial disability" is made under subsection (c) of section 8, and ,it reads as follows:

"For injury producing permanent partial disability, the compensation shall be one-half the difference between the wages of the injured employee before the injury and the wages which he is able to earn thereafter subject to a maximum of ten dollars per week to be paid for the period of disability not exceeding 300 weeks."

A claim under this section was allowed by the court in Mack v. Legeai, 144 La. 1017, South. 694, for injury to a servant's knee which caused a permanent partial disability.

The district judge found that the first and third fingers on plaintiff's right hand were stiff because of the injury to the middle finger and the amputation therof, and that the injury produced permanent partial disability, and gave judgment under the above subsection (c).

Plaintiff was the only witness on his behalf. After testifying to the manner in which he received the accident to his middle finger and the amputation thereof, he was asked about the condition in which his hand had been left after the amputation, and he replied: "Well, about the best I can do is to show you my hand." And he testified that he could not do the work of derrick man, which position he had been occupying at the time of the accident. He further said that the condition of his hand unfitted him permanently for the work that he had been doing, and that two of his fingers were now stiff. On cross-examination he said that his fingers were stiff "to a certain extent," but that they were not "completely stiff," and that they were "going to stay permanently injured." I am the same as one-handed man when it comes to work that I was doing before." He would not say that he would never be able to do any more work of any kind, but said that he would be able to do some work, and to receive pay for it. With reference to his hand he said: "Well, I cannot use it much; I can climb no more derricks, and can handle no more engines and makes $4.00 a day. I have no strength in it, cannot bend my fingers." "Yes, sir. I can bend them, but not over a reverse lever." He further testified that "by the strength of his right hand he could not, by the muscles of that hand, pull the fingers down to the palm."

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The testimony of plaintiff is not corroborated in any degree, and, at its best, it does not convince us that he is suffering with a "permanent partial disability" beyond the loss of one finger. Two of his fingers on his right hand may be stiff, and doubtless are so; but there is no evidence, except his own to that effect, that this stiffness is permanent. And, with reference to this matter, he is contradicted by three physicians, or surgeons, who treated his hand, and examined it in the court room. These doctors testified that, while there is some stiffness of the two fingers, there is no inflammation in the joints, and that this stiffness will gradually disappear. On the day of the trial, eight months after the accident, the physician testified that the stiffness then present was overcome by "the least little pressure;" that the flexion was 95 per cent. perfect, while the extension was 100 per cent. perfect. This would indicate that the disability of the hand was not only partial, but that it was also only temporary. These doctors worked the fingers of plaintiff's hand so as to cause them to touch the palm, which, while it naturally caused some pain, indicated that with persistent effort the use of these fingers would be entirely restored.

The evidence also showed that men with one hand were working on derricks and at other jobs in the oil fields.

As we have come to the conclusion that plaintiff's injuries do not result in a "permanent partial disability" under subsection (c) of section 8 of the compensation Act, it becomes unnecessary to touch the question presented by defendant as to whether the stiffening of two fingers on plaintiff's right hand is due to an "accident," or whether it is an "injury" or a "personal injury," mentioned in sections 38 and 39 of the act. In the case of Behan v. Honor, 143 La. 348, 78 South. 589, L. R. A. 1918F, 862, where the plaintiff was a vi tim of locomotor ataxia, which was not one of the personal "injuries" or "accidents" mentioned in the act, the court said:

"The injuries he suffered by the accident, and the immediate change in his physical condition, leave no reasonable dobt that the accident superinduced, and was the proximate cause of the disability of which he complains."

And so it might be held that the stiffness of the two fingers on plaintiffs hand was due to the amputation of the middle finger, which had been mashed by accident, while he was in the employ of the defendant. But the injury did not produce a permanent partial disability.

It is therefor ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of defendant dismissing plaintiff's demand at his cost.

MONVOISIN v. PLANT. (No. 23905.)

(Supreme Court of Louisiana. June 10, 1920.)

85 Southern Reporter, 206.

2. MASTER AND SERVANT — COMPENSATION FOR DEATH PRESCRIBED BY ONE YEAR.

Where a servant died as a result of an accident which befell him more than a year previous to his death, the Compensation Act does not give a right of action to his survivors.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

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Appeal from Civil District Court, Parish of Orleans; George H. Theard, Judge.

Suit by William Monvoisin against George Plant for personal injury in which plaintiff compromised with defendant on payment of a specific sum and moved for a discontinuance as in case of nonsuit, which was ordered. Subsequently plaintiff filed a supplemental amended petition making the original defendant and the Ocean Accident & Guaranty Corporation, Limited, parties defendant for the same accident and injury. The order permitting the supplemental amended petition was vacated as to the original defendant. Plaintiff caused the rule to be served on the defendant Accident Company, and subsequently plaintiff died, and Mrs. Monvoisin, plaintiff's mother, and his brothers and sisters made themselves parties, moving for judgment against the Insurance Company. Exceptions were sustained, and the rule discharged, and plaintiff's appeal. Affirmed.

George Sladovich, of New Orleans, for appellants.
Gordon Boswell, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff, a longshoreman, while engaged in loading a vessel in the port of New Orleans, met with a serious accident and he has sued the defendant, his employer, in damages amounting to $31,000, or, in the alternative, for $4.160, under the Employers' Liability Act. The accident happened on December 29, 1917; and this suit was filed September 26, 1918. The case was within the admiralty jurisdiction.

On November 16, 1918, plaintiff entered into a compromise with the defendant on payment to him of $3,000 by the latter, and on November 22, he moved a discontinuance of his suit, as in case of nonsuit. This was ordered.

On June 16, 1919, plaintiff filed a supplemental and amended petition in which he made Plant, the original defendant, and the Ocean Accident & Guaranty Corporation, Limited, parties defendant, claiming $14,050 for the same accident and injury. Plant, the main defendant, moved to vacate the order permitting the filing of the supplemental and amended petition in this proceeding. The co-defendant, the Ocean Accident & Guaranty Corporation, excepted to the petition on the ground that it disclosed no cause of action; and it pleaded the prescription of one year in bar of plaintiff's claim.

[1] The rule filed by Plant was made absolute January 2, 1920, and the supplemental and amended petition was ordered stricken from the record in so far as he (Plant) was concerned.

The ruling was correct. A plaintiff, in any state of the suit previous to judgment being rendered may discontinue the suit on paying costs, and, after discontinuing the suit, he may bring the action anew; but he has no right to ingraft it upon the former proceeding. C. P. arts. 491, 492.

[2] On july 3, 1919, the plaintiff caused a rule to be served upon the remaining defendant, the Ocean Accident & Guaranty Corporation, Limited, calling upon it to produce a certain policy of insurance which he claimed had been issued by said defendant.

Plaintiff, Monvoisin, died October 16, 1919. On November 3, 1919, Mrs. Monvoisin, the mother of plaintiff, and his brothers and sisters, made themselves parties to the litigation, and again asked for the production of the policy of insurance, and at the same time moved that judgment be entered against the insurance company in double the amount claimed in the former petition. This motion or rule appears to be based upon the allegation that the defendant company had confessed liability. But there is no confession in the record.

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The defendant company excepted to the supplemental and amended petition on several grounds. One of them was that plaintiff had died, and that his mother, brothers, and sisters had been made parties plaintiff's in his stead, and that, as defendant had never been a party to the original suit of William Monvoisin v. George Plant, and that the suggestions or reasons alleged by plaintiff's in rule were confused, vague, and contradictory, and that they were not substantiated or borne out by the pleadings, it asked that the exceptions be maintained and the rule be discharged.

January 2, 1920, the exceptions were sustained, and the rule was discharged.

On November 6, 1919, plaintiffs filed a second supplemental petition claiming $9,600 against both defendnats, being double the compensation provided for in the Compensation Act of the state, because of the death of Monvoisin. The defendant corporation, after reserving the exceptions and plea of prescription filed to the first amended or supplemental petition, and to the rule taken in the case, excepted on the ground that the petition did not recite, set forth, or disclose a right or cause of action, and further pleaded the prescription of one year

This exception was maintained January 2, 1920, and the suit was dismissed.

If the death of Monvoisin on October 16, 1919, was caused by the accident which befell him on September 29, 1917, the Compensation Act does not give a right of action to his survivors, as the death did not occur within one year from the date of the accident. The judgment dismissing plaintiff's second amended and supplemental petition was correct.

Affirmed.

PYE v. SOUTHWESTERN GAS & ELECTRIC CO. (No. 22762.)

(Supreme Court of Louisiana. May 31, 1920.)

85 Southern Reporter 232

MASTER AND SERVANT — CESSATION OF COMPENSATION CLAIMANT'S DISABILITY OPEN TO INQUIRY AFTER FINAL JUDGMENT.

The cessation of the disability for which compensation is to be paid under the Employers' Liability Act is open to inquiry even after final judgment.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Proceedings under the Employers' Liability Act (Act No. 20 of 1914) by Joe Pye to obtain compensation for personal injuries, opposed by the Southwestern Gas & Electric Company. There was an award of compensation, and the employer appeals. Motion by appellant that cause be remanded to receive proof to fix definitely the extent of the employee's incapacity. Motion granted.

Wilkinson & Lewis and E. W. & P. N. Browne, all of Shreveport, for appellant.

Barret & Files and J. B. Herold, all of Shreveport, for appellee.

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PROVOSTY, J. The following motion filed in this court is self-explanatory, to wit:

"Now comes the Southwestern Gas & Electric Company, defendant-appellant in the above numbered and entitled cause, through undersigned counsel, and with respect shows:

"(1) That this case arose under the Employers' Liability Act; that judgment was rendered in favor of plaintiff and against your defendant for $1,200, based on the theory that plaintiff had suffered a permanent partial disability as a result of the injury complained of.

"(2) Appearer shows that plaintiff testified on the trial of this case that because of the injury he was unable to do any work (transcript, 32), and that he was figuring on going to the farm opposite Natchitoches with his people (transcript, 35), and that, unless some one helped him out, he would starve (transcript, 32), and that this testimony largely influenced the judgment, giving him the maximum for permanent partial disability, and that it was conceded by defendant that plaintiff was entitled to recover $58, and under the evidence submitted to the lower court and contained in the transcript of appeal said sum is the maximum amount of which plaintiff should recover.

"(3) Appearer further shows that since the trial of the said cause, and after the filing of the transcript in this court, it has been advised that plaintiff is now engaged in lucrative employment, and that the incapacity claimed by him has entirely disappeared; that plaintiff left Shreveport soon after the trial of this case, in which he testified he could do no work, and went to Chicago, where, on the 22d day of June, 1917, he secured work as a laborer for the Illinois Steel Works of South Chicago, Ill., where he was regularly employed as a laborer, receiving wages of $3.40 per day for the first 13 weeks, after which time his wages were steadily increased until he was receiving $5.10 per day on May 1, 1919, and in many instances working overtime, receiving as high as $7.10 per day, all of which is fully shown by the certified copy of the South Works pay roll record of the Illinois Steel Works Company, marked Exhibit A, and by photographic reproduction of plaintiff's employment card, marked Exhibit B, affidavit of Alex Wilson, marked Exhibit C, affidavit of Henry Hill, marked Exhibit D, affidavit of Samuel Helme, marked Exhibit E, and affidavit of Lewis B. Jacobs, marked Exhibit F, all of which are attached hereto and made part hereof; that it was impossible to obtain the evidence as shown by the attached documents for use in the trial, because said evidence was not then in existence.

"(4) That the evidence which your appearer desires to introduce will fix definitely the extent of the plaintiff's incapacity, thereby fixing the exact amount of compensation due.

"(5) Appearer shows that, in the event the court should not reverse the judgment herein on the evidence contained in the transcript, then and in that event said cause should be remanded to the lower court in order to receive such proof as to fix definitely the extent of plaintiff's incapacity as aforesaid."

The exhibits in question are annexed to the motion, and the prayer is that the case be remanded for taking the evidence in question. The cessation of the disability for which compensation is to be paid is open to inquiry even after final judgment. A fortiori is it so open before final judgment. Therefore, as the affidavit and the exhibits annexed to it appear to be in due form.

It is ordered that case be remanded for the taking of the evidence referred to in the motion for remand filed in this court.

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STEWART & CO. et al. v. HOWELL et al. (No. 9.)

(Court of Appeals of Maryland. June 16, 1920.)

110 Atlantic Reporter 899

6. MASTER AND SERVANT—EVIDENCE AS TO CAUSE OF INJURY HELD FOR JURY.

In a proceeding under the Workmen's Compensation Law, evidence sufficient to take to the jury the contention that the injury was result of a blow.

(For other cases, see Master and Servant, Dec. Dig. § 409½. New, Vol. 7A Key No. Series.)

7. MASTER AND SERVANT—PROVISION THAT ONE APPEALING SHALL HAVE BURDEN OF PROOF PLACES NO ADDED BURDEN ON PLAINTIFF.

Workmen's Compensation Law, § 56, placing the burden of proof on one appealing from decision of the Industrial Accident Commission, does not cast any added burden on a claimant who is denied compensation by the commission, but merely shifts the burden in case the commission should decide in favor of the claimant and the defendant appeals, so denial of a prayer under the law that the burden was on claimant to show that decision of the commission was incorrect was not error; other instructions as to burden of proof being sufficient as to the burden on claimant.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Appeal from Baltimore City Court; Henry Duffy, Judge.

"To be officially reported."

Claim by Cora L. Howell and others under the Workmen's Compensation Act for compensation for the death of Adam J. Howell, employee, opposed by Stewart & Co., employer, and the Travelers' Insurance Company, insurer. Compensation was denied by the Industrial Accident Commission, and, the decision having been reversed on appeal to the Baltimore city court, the employer and insurer appeal. Affirmed.

The following are the prayers referred to in the opinion:

Claimant's Prayers.

I. The jury are instructed, at the request of the claimant, that if they shall find from the evidence in this case that Adam J. Howell died on or about the 26th day of May, 1917, and that his said death was due to accidental injuries received by him on or about the 4th day of March, 1917, arising out of and in the course of employment by Stewart & Co., one of the defendants in this case, then the verdict of the jury must be in favor of the claimant. (Granted.)

II. The jury are instructed, at the request of the claimant, that if they shall find from the evidence in this case that Adam J. Howell, while in the employ of Stewart & Co., one of the defendants in this case, received injuries on or about the 4th day of March, 1917, arising out of and in the course of his said employment, and that said injuries produced or caused a rupture of the aorta or large blood vessel leading from the heart resulting in his death on or about the 26th day of May, 1917, if the jury shall so find, then the verdict of the jury must be in favor of the claimant, even though the jury may believe from the evidence in this case that said Adam J. Howell was suffering prior to and at the time of receiving said injuries with an aneurism or weakened condition of said blood vessel. (Granted.)

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Defendants' Prayers.

(1) The defendants pray the court to instruct the jury that there is no evidence in this case legally sufficient to entitle the plaintiff to recover; therefore, the verdict of the jury must be for the defendants. (Refused.)

(2) The court instructs the jury that there is no evidence in this case legally sufficient to show that the death of the deceased, Adam J. Howell, was due to an accidental personal injury arising out of and in the course of his employment; therefore, the verdict of the jury must be for the defendants affirming the decision of the State Industrial Accident Commission. (Refused.)

(3) The court instructs the jury that the decision of the State Industrial Accident Commission dated December 20, 1917, disallowing the claim of Cora L. Howell for compensation in this case, is prima facie correct; therefore, the burden is upon the plaintiff Cora L. Howell to show by a preponderance of the evidence that said decision is not correct and, if the minds of the jury are in a state of even balance as to the correctness or incorrectness of said decision, then the verdict of the jury must be for the defendants affirming said decision of the State Industrial Accident Commission. (Refused.)

(4) The court instructs the jury that the State Industrial Accident Commission by its order dated December 20, 1917, determined that the death of Adam J. Howell was not due to an accidental injury arising out of and in the course of his employment, and for that reason the said State Industrial Accident Commission disallowed the claim of the claimant in this case Cora L. Howell, and that said decision is prima facie correct, and the burden is upon the said claimant, Cora L. Howell, to show by a preponderance of the evidence that the death of Adam J. Howell was due to an accidental injury arising out of and in the course of his employment, and, if the minds of the jury are in a state of even balance as to whether or not the death of said Adam J. Howell was or was not due to an accidental injury arising out of and in the course of his employment, then the verdict of the jury must be for the defendants, affirming said order of the state Industrial Accident Commission. (Granted.)

(5) The court instructs the jury that notwithstanding they may find from the evidence that Adam J. Howell, the deceased, met with an accident to his shoulder on or about March 4, 1917, while employed by Stewart & Co., one of defendants, and notwithstanding they may further find that the said Adam J. Howell died on or about the 26th day of May, 1917, nevertheless, the jury cannot find for the plaintiff Cora L. Howell, his widow, unless the jury shall further find that the said Adam J. Howell's death was due to said injury arising on or about March 4, 1917, and that of this there is no legally sufficient evidence. (Refused.)

(6) The court instructs the jury that notwithstanding they may find from the evidence that Adam J. Howell, the deceased, met with an accident to his shoulder on or about March 4, 1917, while in the employ of Stewart & Co., one of the defendants, and notwithstanding they may further find that the said Adam J. Howell died on or about the 26th day of May, 1917, nevertheless, the jury cannot find for the plaintiff Cora L. Howell, widow of the said deceased, unless the jury shall further find that the said Adam J. Howell's death was a result of said injury. (Granted.)

(7) The court instructs the jury that there is no evidence in this case legally sufficient to show that the death of Adam J. Howell was due to the injury which he sustained on or about March 4, 1917, while in the employ of Stewart & Co.; therefore, the verdict of the jury must be for the defendants, affirming the order of the State Industrial Accident Commission. (Refused.)

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(8) The court instructs the jury that the burden of proof is upon the plaintiff Cora L. Howell, widow of Adam J. Howell to prove by a preponderance of the evidence that the said Adam J. Howell's death on or about May 26, 1917, was due to the accident which he sustained to his shoulder on or about March 4, 1917, while in the employ of Stewart & Co., and, if the minds of the jury are in a state of even balance as to whether or not said death was due to said injury, then the verdict of the jury must be for the defendants, affirming the order of the State Industrial Accident Commission. (Granted.)

(9) The defendants pray the court to instruct the jury that medical expert testimony to the effect that the accident happening to Adam J. Howell on March 4, 1917, might possibly have some connection with the death, is not equivalent to evidence that sa.d accident either actually caused or hastened the death of Adam Howell, and they are further instructed that their verdict should be for the defendant unless they are satisfied from all the testimony that said accident actually caused or hastened the death of Adam Howell. (Refused.)

Argued before Boyd, C. J., and Briscoe, Thomas, Pattison, Urner, Stockbridge, and Adkins, JJ.

George Weems Williams and L. Vernon Miller, both of Baltimore, for appellants.

Robert Biggs and C. Arthur Eby, both of Baltimore, for appellees.

ADKINS, J. Adam J. Howell, husband and father of appeelles, while working for Stewart & Co. in their building at the corner of Howard and Lexington Streets, Baltimore, on March 4, 1918, was struck by a heavy board which slipped while being drawn up by another workman. The board was caught by the foreman, but he could not hold it, and the end struck Howell in the chest between the shoulder and the heart. The immed'ate effect of the blow was to cause him to stop work that afternoon for a time variously estimated at from 20 minutes to 2 hours, at the expiration of which time he returned to work and continued to work the rest of that afternoon and through the night.

When he returned to his home on the morning after the accident, he showed his wife where he was injured. There was a bruise on his left side just above the heart. He told her "he was in great pain, and he was very sick, and that he was injured, and that he never could get over it. He says, 'I can never live.'"

The widow further testified that her husband was perfectly healthy prior to the accident, and was never sick; that he had never had any doctors and worked every day; that he was always strong and healthy, and could work in any kind of weather; never made any complaint, but would eat three meals a day and sleep well at night; that he had been well all the time until he was injured, but after the injury he suffered a great deal; that he could not sleep at night at all; could not sit still or lie down but just a short time; this was all the time for the last week before he died; prior to the last week he suffered a great deal, could not sleep; his appetite was poor, and he was complaining all the time, that after the accident he went back to Stewart's and worked there for about two weeks and after that worked a few days at other places, the last place being on Baltimore street where he was taken sick the last time. He died at the University Hospital on May 26th.

Mrs. Elizabeth Francois, a nurse at Stewart & Co.'s, testified that Howell came to her before the accident "complaining of a pain in the side, right through his back and chest, and had a very bad cough"; he was coming up to her about three weeks before the accident.

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Several doctors testified that Howell died of an aneurism of the aorta, and that in their opinion the aneurism was present before the accident, and that the accident had practically nothing whatever to do with with the rupture so far as they could see from its description, and judging from the time of the accident to the time of death.

It is not perfectly clear, however, from their testimony that the blow might not have hastened the result.

Dr. L. B. Evans, who treated Howell after the accident, testified that his examination showed that the disease from which Howell died was not of long standing, but was the result of the blow which he had received on the chest; that it was a traumatic aneurism assuming the correctness of the medical chart offered in evidence showing aortic aneurism to have been the cause of death.

The decision of the Industrial Accident Commission on practically the same testimony as was offered on the appeal to the Baltimore city court was against the claimants, which decision was reversed by the city court, from which this appeal was taken.

There are twelve bills of exception. The first six are to the overruling of objections to questions and refusal to strike out answers of the widow of Howell in regard to his feelings as expressed by him to her on his return home after the accident. We find no error in these rulings.

[1] The seventh was to the following question propounded to Dr. L. B. Evans:

"Keeping in mind your physical examination of Howell, when you saw him professionally, when you made the extensive physical examination of his body, and knowing now what the chart gives you of his death and the causes which led immediately to his death, I would like you to tell the jury whether or not in your opinion a traumatic aneurism could have resulted from that injury?"

Assuming the question to be open to the objection that it asks for a speculative opinion as to what might have been the effect of the injury rather than the doctor's judgment as to what its effect really was, such error was cured by the answer of the doctor, which was as follows:

"Of course, it was the only conclusion that could be drawn. The man gave a negative history of any of the diseases that produce pathological aneurisms. Therefore I could not assume that he had pothological aneurisms from diseases which did not exist, never existed. He gave the history of an injury which was capable of producing a traumatic aneurism by the force being transmitted to the chest in sufficient volume to produce rupture of one or more of the coats of the artery, giving rise to this particular type of aneurism, a traumatic aneurism. It was the only conclusion I could draw."

The answer shows that the doctor thought he was being asked what in his judgment caused the aneurism, and not what the question really asked. As understood by him, the question was unobjectionable, and therefore there was no reversible error.

[2] The eighth exception was to the question immediately following the above. It was leading, but did no harm, as it practically embodied what the doctor had said in his previous answer. Of course, the practice of repeating testimony of witnesses by counsel is not to be encouraged, but there was no reversible error here.

[3] The tenth exception is to the refusal of the court to permit a witness to answer a question, the substance of which was embraced in a later question, objection to which was overruled; consequently no harm was done.

[4] The eleventh exception is to the overruling of defendant's objection to the following question asked Dr. L. B. Evans in rebuttal:

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"There seeems to be, doctor, some difference of opinion among the doctors here representing the defendants on the question. Assume that the man did have a pre-existing aneurism and received the blow which Mr. Howell is said to have received, what effect would that blow have upon hastening the trouble with the patient?"

We think the objection was properly overruled.

This brings us to the twelfth exception, it being to the rulings of the court on the prayers, all of which will be set out by the Reporter.

Plaintiff offered two, both of which were granted, and defendants nine, of which the fourth, sixth, and eighth were granted, and the first, second, third, fifth, seventh, and ninth were refused.

[5, 6] The plaintiff's prayers were properly granted. The only objection urged to them, apart from special exceptions which will be considered in connection with defendants' prayers, is that they assume certain facts. We do not find this objection to have been well taken. Defendants' first, second, fifth, and seventh prayers ask for an instructed verdict in favor of defendants on the following grounds:

That there is no evidence legally sufficient to entitle plaintiff to recover.

That there is no evidence legally sufficient to show that the death of the deceased was due to an accidental pectoral injury arising out of and in the coure of employment.

That there is no evidence legally sufficient to show that the death of the deceased was due to an injury.

It is difficult to understand how these prayers could have been granted, or the special exceptions to plaintiff's prayers could have been sustained, without entirely disregarding the positive testimony of the widow and of Dr. L. B. Evans and of Dr. Kirby, all of which, of course, must be taken to be true, and as if uncontradicted, in considering these prayers and exceptions. Dr. Evans' testimony and that of the widow has already been referred to. Dr. Kirby testified, in answer to the question, "Assuming that this aneurism was of old standing and progressive, what effect, if any, would the blow upon the shoulder and upper part of the chest likely have upon that in hastening the time of death?" "It would increase the existing conditions if the blow was sufficient to cause that change." There was abundance of testimony as to the force of the blow.

It will be noted that the testimony of Dr. Evans is, not that death "might have been" due to the blow, but that in his opinion it "was" due to the blow.

Also, that the testimony of Dr. Kirby is, not that the blow "might have" increased existing conditions, but that it "would" increase them if of sufficient force.

This testimony takes this case out of the principle governing the following English cases relied on by appellants, viz.: Barnabas v. Beisham Colliery Co., 3 Butterworths' Workmen's Compensation Cases, 216; Maxwell v. Ruabon Coal & Coke Co., Ltd., 10 B. W. C. C. 138; Hawkins v. Powell Tillery Steam Coal Co., Ltd., 1 K. B. 988.

The principle underlying all the above cases is that it is not sufficient to show that death "may have" resulted from the accident, or that the accident was one of "several possible" causes of death.

On a careful examination of the other cases cited by appellants, we find:

All that Knight's Case, 231 Mass. 142, 120 N. E. 395, decides is that there was evidence from which the lower court could find as it did, and that the appellate court could not say as a matter of law that the finding of the board was unwarranted.

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Taylor v. Bolckow, Vaughan & Co., Ltd., 5 B. W. C. C. 130, decides nothing except that the reasons given by the trial judge for his judgment are not in accordance with the evidence. The case was sent back for another trial.

The facts in Paton v. William Dixon, Ltd., 6 B W. C. C. 882, are different, and the decision has no bearing on the case at bar.

Clover Clayton & Co. v. Hughes, 3 B. W. C. 275, is authority for the submission of the present case to the jury. See, also, In re Fisher. 220 Mass. 581, 108 N. E. 361; In re Madden, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000.

We find no error in the ruling on these prayers and on the special exceptions to plaintiff's prayers.

[7] Defendant's third prayer asserts the proposition that the burden is upon the plaintiff to show that the decision of the Industrial Accident Commission is not correct.

The form of this prayer was disapporved in the case of Jewell Tea Co. v. Weber, 132 Md. 178, 103 Atl. 476, though the granting of the prayer was held not to have been a reversible error. It was then said by Judge Thomas speaking for the court, referring to a similar prayer:

"While it states a correct legal proposition, and could not have misled the jury in this case, we cannot approve the form adopted. Prayers should instruct the jury in regard to the law applicable to certain facts to be found by them. An appeal from a decision of the commission may present questions of law as well as questions of fact, and an instruction as to the burden of proof should be confined to the issues of fact to be decided by the jury."

We think defendants' fourth prayer, which was granted, gives the defendants at least as much as they were entitled to in the matter of burden of proof.

As we understand section 56 of the Workmen's Compensation Law (Code art. 101, § 56), it does not mean that there must be additional testimony offered on appeal from the commission; or that even as much testimony need be offered by the party taking the appeal as he produced before the commissioner in order to discharge the burden put upon him by that section. But it simply puts the burden of proof upon the party taking the appeal whether he be plaintiff or defendant. In other words, it establishes no new rule when the plaintiff happens to be the party appealing, as the burden was always upon the plaintiff to prove his case. But it shifts the burden from the plaintiff to the defendant, where the defendant loses before the commission and desires to appeal from its decision, requiring the defendant in such a case to satisfy the jury by a preponderance of testimony that the plaintiff is not entitled to the award made by the commission.

This prayer was properly refused.

[8] The ninth prayer asks the court to instruct the jury as to the comparative value of testimony, or as to a proper differentiation between certain kinds of testimony. As a rule, such prayers should not be granted; at any rate, there was no error in refusing an instruction of that sort in this case, as the granted prayers fully and fairly instruct the jury as to the law of the case.

Finding no reversible error in any of the rulings of the trial court, the judgment will be affirmed.

Judgment affirmed with costs to appellee.

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UNITED STATES FIDELITY & GUARANTY CO. v. TAYLOR ET AL. (No. 24.)

(Court of Appeals of Maryland. June 17, 1920.)

110 Atlantic Reporter 883.

3. MASTER AND SERVANT—INSURANCE CARRIER NOT ENTITLED TO RELIEF FROM AWARD UNDER WORKMEN'S COMPENSATION ACT, WHERE IT DID NOT APPEAL OR ASK FOR A HEARING.

Where claim filed with State Industrial Accident Commission by employee's widow under Workmen's Compensation Act, and report of accident filed by insured, both stated that deceased was employed by insured, and where insurance carrier did not ask for a hearing or appeal from the award made by the commission, but commenced payment of compensation pursuant thereto, it could not thereafter obtain relief from such award on ground that deceased was not employed by insured in absence of allegations of fraud or intentional concealment or that it was prevented from obtaining knowledge of all the facts.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Circuit Court of Baltimore City; Robert F. Stanton, Judge.

"To be officially reported."

Bill by the United States Fidelity & Guaranty Company against Emilie Taylor, widow of Robert L. Taylor, deceased, and another. Decree of dismissal, and plaintiff appeals. Affirmed.

Argued before Boyd, C. J., and Briscoe, Thomas, Pattison, Urner, Stockbridge, Adkins, and Offutt, JJ.

J. Kemp Bartlett, Jr., of Baltimore (Bartlett, Poe & Claggett, of Baltimore, on the brief), for appellant.

J. Royall Tippett, of Baltimore, for appellees.

STOCKBRIDGE, J. The case presented by this record has some peculiar features, but involves no novel principle of law for determination.

The United States Fidelity & Guaranty Company was the insurance carrier for the Robert Ramsay Company for injury to its employees under the Workmen's Compensation Act.

The appeal before this court is from a ruling of the circuit court of Baltimore City sustaining a demurrer to a bill of complaint filed by the United States Fidelity & Guaranty Company against Emilie Taylor, widow of Robert L. Taylor, and the Robert Ramsay Company. Taylor, the deceased, was a tally clerk, and while in the discharge of his duty was drowned on the 1st of March, 1917.

On the 1st of May, 1917, Emilie Taylor filed her claim with the State Industrial Accident Commission, and sets out that at the time of his death here husband, Robert L. Taylor, was in the employ of the Robert Ramsay Company.

On the 3d of May there was filed with the said commission what purported to be the employer's first report of the accident, as required by the provisions of chapter 800 of the Acts of 1914. This report was signed by A. B. Gillespie, as superintendent of the Robert Ramsay Company.

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The bill then alleges that at the time of his heath Mr. Taylor was employed by the Johnston Line Steamship Company, and was not an employee of the Robert Ramsay Company.

No application for a hearing within the required time was filed by the Robert Ramsay Company, and accordingly on the 16th of May, 1917, the commission awarded compensation to the widow against the Robert Ramsay Company and the appellant as insurance carrier. Payments were made in acordance with the award to the 1st of October, 1917, when the insurer discontinued further pyments. Notice of the discontinuance was given to the State Industrial Accident Commission on the 29th October, 1917.

In the month of March, 1918, suit was brought by the widow against the Robert Ramsay Company and the United States Fidelity & Guaranty Company for payment of the amount awarded by the Commission, and the payment of which had been discontinued.

In June, 1919, the bill of complaint was filed by the United States Fidelity & Guaranty Company asking for an injunction against the further prosecution of the suit at law which had been instituted.

To this bill Mrs. Emilie Taylor, through her counsel, filed a demurrer, and from the decree of the circuit court of Baltimore City sustaining that demurrer, and dismissing the bill, this appeal has been taken.

The theory of the bill is that there was a mistake which had occurred without fault on the part of the insurance carrier, and that it is entitled to be relieved from its obligation, inasmuch as it was an insurance carrier only for the Robert Ramsay Company, and not for the Johnston Line Steamship Company.

The bill further sets out that it was not until some time in the month of May, 1919, that the mistake was discovered, and that therefore its bill filed in June was seasonably filed so that no imputation of delay can be ascribed to it.

[1] The effect of the demurrer is, of course, to admit all the facts properly pleaded, and the question upon which the case must turn is, therefore, a question of law rather than a question of fact.

There is one additional matter to be mentioned in limine, namely, that A. B. Gillespie, who signed the report of the accident to the State Accident Commission, and described himself therein as "superintendent of the Robert Ramsay Company," was also the agent of the port of Baltimore of the Johnston Line Steamship Company. To this dual position is probably to be attributed much of the confusion which occurred.

Another source of the confusion arises as a consequence of the decision of the Supreme Court of the United States in the case of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918 C, 451, Ann. Cas. 1917E, 900, by which it was held that the State Compensation Law had no application whatever to the cases of stevedores or those working in a cognate capacity upon the loading or unloading of vessels bound from one state to another, or from a port in this country to a foreign port. Prior to this decision this had been a mooted point, and but for that decision this case would probably never have arisen.

The present contention is that Taylor was an employee of the Johnston Line Steamship Company, and not of the Robert Ramsay Company; that the United States Fidelity & Guaranty Company was the insurance carrier of the latter company, but not of the former, and in the light of the decision of the Supreme Court there was no liability whatever upon the part of the United States Fidelity & Guaranty Company as insurance carrier; and that the contract embodied in its policy of insurance was void.

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The present litigation, therefore, is to be determined only with regard to the award of the State Industrial Accident Commission, and in construing the Workmen's Compensation Act this court said, in the case of Frazier v. Leas, 127 Md. 575, 96 Atl. 765, that—

"The construction must be liberal in favor of private right, and construction which imputes an intention to deny valuable rights should be avoided."

Here the right of Mrs. Taylor to compensation for the death of her husband is clearly a valuable right, and a right which this court is asked to annul.

The insurance carrier knew and must be deemed to have known for whom it was carrying insurance, whether for the Robert Ramsay Company or the Johnston Line Steamship Company, or both. In the original claim filed by Mrs. Taylor with the State Accident Insurance Commission, and in the report of the Robert Ramsay Company, the deceased is said to have been an employee of that company, and it was upon that basis that the award was made.

It further appears that no hearing was asked before the commission, either by the Robert Ramsay Company, or the insurance carrier, nor did either appeal from the award made, to the court as they had the right to do under the provision of the Workmen's Compensation Act.

[2] It has long been the settled rule in this state that where an appeal is given by law to the parties to be affected by the action of the tribunal, to which the power is given in the first instance of passing upon the question involved, any objection going to the legality or regularity of the proceeding is open for review on that appeal, and redress on such grounds must be sought in that mode only. Hazlehurst v. Baltimore, 37 Md. 199, 220.

[3] If the insurance carrier had any doubts as to whether the loss which had occurred was one covered by its policy, it could have asked for a hearing and required strict proof before the State Industrial Accident Commission, or, if not satisfied with the conclusion of the Commission upon that point, could have raised it under the provisions of the act for an appeal before the court. But it did neither of these things.

There is one phase of the case a little difficult to understand. The payments under the award of the commission were discontinued from October, 1917; yet the bill in terms alleges that it did not know of what is now represented as a mistake, until the 6th of May, 1919. There is thus apparent a certain amount of inconsistency in the bill itself, which is nowhere satisfactorily explained.

The character of the mistake for which equity will furnish relief is well stated in the cases of Renshaw v. Lefferman, 51 Md. 277, and Groff v. Rohrer, 35 Md. 327.

In Kearney v. Sascer, 37 Md. 264, Robinson, Justice, delivering the opinion of this court, said:

"Application to a court of equity for relief against a judgment, will be justified by showing any fact which clearly proves that it would be against conscience to execute the judgment, and of which the injured party could not have availed himself at law; or of which he might have availed himself at law, but was prevented by fraud, or accident unmixed with any fault or negligence in himself."

There is no imputation of any actual fraud in the present case, or of any intentional concealment, or that the insurance carrier was prevented by its assured from obtaining knowledge of all the facts.

The case does not, therefore, fall within the rule laid down by Mr. Pomeroy in his valuable book on Equity Procedure upon which courts have acted in restraining the enforcement of judgments. Nor are any of the cases referred to by the appellant based upon facts at all similar

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to the present case, inasmuch as here we have a case where what is now alleged as a mistake might easily have been found out by the insurance carrier by a careful investigation at the time of the accident, or during the months following in which the award was paid.

[4] It cannot, therefore, be said that the ignorance of the appellant was unmixed with negligence in itself, and when that condition occurs courts of equity uniformly refuse to afford any relief.

For the reasons indicated, the decree appealed from will be affirmed.

Decree affirmed, with costs.

BURNS v. MILLERS' MUT. CASUALTY CO. (No. 21851)

(Supreme Court of Minnesota. July 16, 1920.)

178 Northwestern Reporter 812.

(Syllabus by the Court.)

2 MASTER AND SERVANT—MUNICIPAL COURT COMPLAINT HELD BAD UNDER COMPENSATION ACT AND NOT WITHIN COURT'S JURISDICTION.

In an action brought in the municipal court court, the complaint alleged that defendant assumed and agreed to pay the liabilities of an insurance company, which had insured plaintiff's employer under the provisions of the Workmen's Compensation Act, and that such company was indebted to plaintiff in a stated sum on account of a personal injury he had sustained in the course of his employment at a time when he and his employer were both subject to the act. *Held,* that the complaint failed to state a cause of action, and that the cause of action plaintiff attempted to allege was not within the jurisdiction of the municipal court.

(For other cases, see Master and Servant, Dec. Dig. §§ 394, 396.

Appeal from District Court, Waseca County; Arthur B. Childress, Judge.

Action by James Burns against the Millers' Mutual Casualty Company, brought in the municipal court of Waseca. Demurrer to complaint overruled, and defendant appealed to the district court, wherein plaintiff's motion ot dismiss the appeal was denied, and from the judgment entered on an order sustaining the demurrer, plaintiff appeals. Affirmed.

Moonan & Moonan, of Waseca, for appellant.

A. G. Briggs and Charles H. Weyl, both of St. Paul, for respondent.

LEES, C. This action was brought in the municipal court of Waseca. The complaint alleged that in March, 1917, while employed by the Waterville Furniture Company, plaintiff sustained a personal injury which arose out of and in the course of such employment; that he and his employer were both subject to the provisions of the Workmen's Compensation Act (Gen. St. 1913, c. 84a); that the latter was insured pursuant to section 8227, G. S. 1913; that due notice of the injury was given; that the injury sustained resulted in the permanent loss of 50 per cent. of the use of one of plaintiff's eyes; that his daily wage was $3.25; that he incurred expenses for medical treatment amounting to $51.65; that by reason of the facts above set forth the insurer became indebted to him in the sum of $1,026.25, of which sum $51.65, and no more, has been paid. that in Sep-

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tember, 1917, pursuant to a contract with defendant, the insurer turned over his assets to defendnat, who assumed and agreed to pay its liabilities, including plaintiff's claim, but had failed to do so. Judgment for $499 was demanded. Defendant demurred, and appealed to the district court from an order overruling the demurrer. Plaintiff moved to dismiss the appeal, on the sole ground that it was not taken in the manner provided by law. The motion was denied. The demurrer was then argued by counsel for each party, and an order made sustaining it. From the judgment entered on such order, plaintiff has appealed.

[1] 1. The appeal from the municipal to the district court was taken as provided by chapter 283, G. L. 1917 (Gen. St. Supp. 1917, § 7602). Plaintiff insists that it should have been taken as provided by section 5068, G. S. 1894, for the following reason: The municipal court of Waseca was created pursuant to chapter 229, G. L. 1895. Section 38 of that act reads as follows:

"All appeals from any judgment, order or action of said court shall be had to the district court, * * * in like manner and under the same rules of practice and procedure as in cases of appeal from justice to district courts the general laws of this state relating to appeals from justice courts * * * shall apply to this court."

It is contended that by the act of 1917 the Legislature neither changed nor intended to change the method of taking appeals prescribed by the 1895 Municipal Court Act. The contention cannot be sustained. Section 38 was not intended to make amendments to the statute relating to the manner of appealing from justice courts inapplicable to municipal courts, but to include such courts, so that the procedure in both should be the same in taking appeals to the district court. No other ground for a dismissal of the appeal was suggested in the district court, but it is suggested in plaintiff 's brief, apparently for the first time, that the appeal should have been dismissed because an order of the municipal court overruling a demurrer is not appealable since the amendment to section 38 effected by chapter 104, G. L. 1913 (section 280, G. S. 1913). This point was not raised in the district court; plaintiff basing his motion solely on the ground we have already stated. By failing to raise it, and by voluntarily appearing and arguing the demurrer after his motion was denied, plaintiff waived any right he may have had to have the appeal dismissed on the ground that it was not authorized by statute. Wrolson v. Anderson, 53 Minn. 508, 55 N. W. 597.

[2] 2. The demurrer was properly sustained. The argument that the action is based on a contract between the insurer of plaintiff's employer and the defendant, and not on the Workmen's Compensation Act, is not well founded. The insurer's liability arose under the Compensation Act, and could have been enforced only in the manner therein provided, and only in the district court. Section 8216 and subdivision (m), § 8230, G. S. 1913. Plaintiff's claim for compensation was unliquidated until the parties either made a voluntary settlement determining the amount of the claim and obtained the approval of the judge of the district court, or, if they failed to do so, until the court fixed the amount by its judgment. The insurer's liability was purely statutory. Until it became fixed in the manner provided by statute there was no indebtedness, and no promise to pay compensation could be implied. Plaintiff was therefore bound to state the facts upon which the insurer's liability was predicated. In so far as he has done so, it appears that the cause of action attempted to be stated is not within the jurisdiction of the municipal court, for, if defendant had answered denying liability, plaintiff could not recover without proving the facts necessary to establish liability under the Compensation Act. Defendant has stepped into the shoes of the insurer. The same steps must be taken to charge it that would be necessary if the insurer were the defendant.

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Two grounds for demurrer were stated—the first, that the complaint failed to state a cause of action; and the second, that the municipal court has no jurisdiction. The demurrer was good on both grounds, and the judgment from which the appeal was taken is therefore affirmed.

COLLINS v. JOYCE ET AL. (No. 21758.)

(Supreme Court of Minnesota. July 2, 1920.)

178 Northwestern Reporter 503.

(Syllabus by the Court.)

1. MASTER AND SERVANT—PHYSICIANS AND SURGEONS—EMPLOYER MAY CONTRACT TO PAY PHYSICIAN IN EXCESS OF STATUTORY OBLIGATION FOR TREATING INJURED EMPLOYEE.

An employer, though operating under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230), may agree, with a physician called by him to treat an injured employee, to pay the full value of the physician's services. The evidence in this case sustains a finding that defendants made such an agreement.

(For other cases, see Master and Servant, Dec. Dig. § 393½; Physicians and Surgeons, Dec. Dig. § 24[3].)

Appeal from District Court, Houston County; S. D. Catherwood, Judge.

Action by Dr J. S. Collins against Pat Joyce and Alfred Rasmussen, doing business under the firm name of Joyce & Rasmussen. Verdict for plaintiff, and defendants appeal. Affirmed.

Duxbury & Duxbury, of Caledonia, for appellants.
W. A. Deters, of Caledonia, for respondent.

HALLAM, J. [1] 1. This action is brought by plaintiff, a physician and surgeon, to recover the value of hospital services and medicines. Plaintiff had a verdict for $325. Defendant appeals.

The services were rendered at the request of defendants to one Levi Boltz, one of their employees, who was injured while in their employ. Defendants and Boltz were both within the scope of the Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230). That act made it the duty of defendants to provide Boltz with medical and surgical treatment and medicines and medical and surgical supplies, up to $100. The court administering the Compensation Act might, under certain conditions, allow $200. G. S. 1913, § 8212.

Defendants contend that, inasmuch as the statute made it the duty of defendants to provide this service for Boltz up to a certain amount only, a contract to pay more than that amount would not be implied from a request to perform this service, and that neither can a verdict be sustained for more than the amount fixed by the Compensation Law, on the theory of an express contract.

We are not called upon to consider the principles of implied contract applicable to such cases, for this action is plainly based on an express contract, and the trial court so submitted the case to the jury.

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We see no good reason why defendants might not agree to furnish medical and hospital attention and supplies to their employee in excess of their statutory obligation, if they saw fit to do so, and no reason why they might not obligate themselves to pay plaintiff the full value of such services, furnished to their employee at their request. The question is: Did they so obligate themselves?

The evidence on behalf of plaintiff is, in substance, as follows:

Plaintiff testified that defendant Rasmussen called him and that, while they were on their way to attend Boltz, plaintiff asked, "What about my pay?" and that Rasmussen said:

"We carry insurance; we get our money from the insurance company, and then we pay you; you don't need to worry about that."

The fact probably is that neither party thought or knew of the limitation of the Compensation Act. We think the jury might construe the language used as a contract to pay the value of the services plaintiff should render to Boltz.

[2] 2. Plaintiff was permitted to say that he performed his services on the credit of defendants and not of Boltz. This was proper. Defendants offered proof tending to show that he gave credit to Boltz. This was a material question in the case. It was proper that plaintiff should testify, directly, to whom credit was given This is within the general rule that, whenever the motive, belief, or intention of any person is a material fact to be proved, it is competent to prove it by the direct testimony of such party. Berkey v. Judd, 22 Minn. 287, 297; Grout v. Stewart, 96 Minn. 230, 234, 104 N. W. 966; Timmerman v. Whiting, 118 Minn. 398, 403, 137 N. W. 9; Crandall v. White, 164 Mass. 54, 41 N. E. 204; Jarrell v. Young, 105 Md. 280, 66 Atl. 50, 23 L. R. A. (N. S.) 367, 12 Ann. Cas. 1; 1 Wigmore on Evidence, § 581.

[3] 3. Plaintiff was permitted to offer proof of a statement alleged to have been made by defendant Joyce to plaintiff, after the services were performed, as follows:

"You needn't worry about your pay. We will see to it that you are paid. We took him down there, and we are responsible for your payment."

A verbal promise to pay for services already performed for another is, of course, void under our statute of frauds. G. S. 1913, § 6998. We think, however, this evidence was properly received as an admission of the contract which plaintiff testified had previously been made.

Order affirmed.

STATE EX REL. ALBERT LEA PACKING CO., INC., v. DISTRICT COURT OF FREEBORN COUNTY. (No. 21788.)

(Supreme Court of Minnesota. July 9, 1920.)

178 Northwestern Reporter 594.

(Syllabus by the Court.)

MASTER AND SERVANT—COMPENSATION CLAIMANT HELD ENTITLED TO AWARD FOR TEMPORARY TOTAL DISABILITY BY INJURY TO LEG.

The Workmen's Compensation Act provides that in case of permanent partial disability the loss of the use of a member shall draw the same compensation as is given for the loss of such memeber. For the

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loss of a leg compensation for 175 weeks at 60 per cent. of daily wages is given. The employee suffered a fracture of the upper end of the thigh bone. It did not unite. The result of the injury, more definitely stated in the opinion, is greater than the loss of the use of the leg, and the employee at the time of the trial two years after the accident was unable to work. His disability at that time and since his injury was total. It is *held* that under the findings of the trial court he was not limited to compensation for 175 weeks as for the loss of the use of his leg, but was entitled to compensation for 300 weeks on the basis of temporary total disability.

(For other cases, see Master and Servant, Dec. Dig. § 385[15].)

Certiorari from District Court, Freeborn County; S. D. Catherwood, Judge.

Proceedings under the Workmen's Compensation Act by Frank C. Dudley, to recover for personal injuries, opposed by the Albert Lea Packing Company, Incorporated, employer. Compensation was awarded by the district court, and employer brings certiorari. Affirmed.

John F. D. Meighen and Bennett O. Knudson, both of Albert Lea, for appellant.

Henry A. Morgan, of Albert Lea, for respondent.

DIBELL, J. Certiorari to review the judgment of the district court of Freeborn county awarding compensation to Frank C. Dudley who received an injury while in the employ of the relator, Albert Lea Packing Company.

The schedule of compensation as fixed by Laws 1917, ch. 351, § 1, amending Laws 1913, c. 467, § 13 (Gen. St. Supp. 1917, § 8207), is as follows:

"Section 13. Following is the schedule of compensation: (a) For injury producing temporary total disability sixty per centum of the wages received at the time of the injury, subject to a maximum compensation of twelve ($12.00) dollars per week; and a minimum of six and one-half ($6.50) dollars per week; provided, that if at the time of injury the employee receives wages of less than six and one-half ($6.50) dollars per week, then he shall receive the full amount of such wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks. Payments to be made at the intervals when the wage was payable, as nearly as may be. * * *

"(c) For the permanent partial disability, the compensation shall be based upon the extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule, to wit: * * *

"For the loss of a leg, sixty per centum of daily wages during one hundred and seventy-five (175) weeks. * * *

"In all cases of permanent partial disability, it shall be considered that the permanent loss of the use of member shall be equivalent to and draw the same compensation as the loss of that member; but the compensation in and by said schedule provided, shall be in lieu of all other compensation in such cases. * * *

"In all other cases of permanent partial disability not above enumerated the compensation shall be sixty per centum of the difference between the wage of the workman at the time of the injury and the wage he is able to earn in his partially disabled condition, subject to a maximum of twelve dollars ($12.00) per week. Compensation shall continue during disability not, however, beyond three hundred (300) weeks. * * *"

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The injury occurred on November 3, 1917. The plaintiff suffered an impacted fracture of the upper end of his left thigh bone. He was in a hospital from November 3, 1917, to January 11, 1918, and again from July 18, 1918, to October 3, 1918. The fracture did not unite. It will not unite unless there is another operation. Such operation would be dangerous and of doubtful result. It is not to be advised. He is upwards of 60 years of age. He suffers great pain and is nervous. If he had suffered the loss of a leg, and the result had been ordinarily favorable, he would by this time be in a condition of partial disability only. His disability up to this tme is total. He has suffered more than the loss of the use of his leg. Its use is gone and up to the present time the rest of his body is useless for any working purpose. The condition of the fracture so affects his hips and other parts of his body and there is such attendant pain that he can remain sitting for no considerable length of time. He cannot employ himself in work which may be done by one sitting; nor is there any work suggested which he may do. So the trial court finds. It may be noted in considering the seriousness of his injury that the packing company furnished him the best possible treatment and hospital service to effect a good result. It expended in that behalf $562.25, while the statute strictly requires but $100. The commendable effort of the company to effect a good result has resulted no more beneficially than we have stated.

Dudley was receiving wages at $18.50 per week and he was awarded compensation on the basis of 60 per cent. or $11.10 per week for 300 weeks. This is the maximum in amount and time allowed for a temporary total disability. It is also the maximum in amount, and in time allowed, for a permanent partial disability.

The relator contends that the provision of the statute that the permanent loss of the use of a member shall be compensated on the basis of the loss of the member, which is in lieu of all other compensation, fixes the maximum compensation at 60 per cent. of daily wages for the period of 175 weeks; and that an award beyond such period is not sustained.

The provision for 60 per cent. of wages for 175 weeks is in the portion of the statute referring to permanent partial disability. It is in connection with other provisions fixing a definite award for definite injuries. The compensation is for a definite period, a full period of 175 weeks, not for a maximum period of 175 weeks with a possible lesser minimum. We do not find authorities construing a provision quite like our statute and we confine our holding to the precise question before us. While the relator's contention is pressed with force, it is our view that it was not intended by the statute to limit compensation for such an injury as we have here to compensation for the loss of a leg. The statute is to be construed liberally in favor of the employee. Dudley at the time of the trial and from the date of his injury suffered a total disability, assumed to be temporary, and was entitled to compensation accordingly. It does not appear that the disability will be less within the period of 300 weeks. The parties have such right to a readjustment, if occasion comes as the statute gives them. G. S. 1913, § 8222; State v. District Court, 136 Minn. 147, 161 N. W. 391; Hunnewell's Case, 220 Mass. 351, 107 N. E. 934.

Order affirmed.

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AMERICAN SMELTING & REFINING CO. v. CASSIL. (No. 21288.)

(Supreme Court of Nebraska. June 19, 1920.)

178 Northwestern Reporter 639

MASTER AND SERVANT — FINDINGS ON SUBSTANTIALLY CONFLICTING EVIDENCE CONCLUSIVE.

On appeal from the district court to the Supreme Court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Rose, J., dissenting.

Appeal from District Court, Douglas County; Redick, Judge.

Claim by Catherine Cassil, widow of A. C. Cassil, deceased employee, against the American Smelting & Refining Company, employer, for compensation under Workmen's Compensation Act. Claim allowed by Compensation Commission with deductions, and the employer appealed to the district court, where the claim was disallowed and the proceeding dismissed, and the claimant appeals. Affirmed.

Wm. J. Hotz and George A. Lee, both of Omaha, for appellant.

Crofoot, Fraser, Connolly & Stryker, of Omaha, for appellee.

MORRISSEY, C. J. Under the Workmen's Compensation Act (Laws 1913, c. 198) Catherine Cassil, defendant, presented to the Compensation Commissioner, on account of the death of her husband, A. C. Cassil, a claim against the American Smelting & Refining Company, for $12 a week for 350 weeks and $100 for expenses of his last illness and funeral. On the premises of plaintiff defendant's husband was shot by Terrence Casey at night, January 27, 1919, and died the next morning. Plaintiff is engaged in the smelting and the refining of ores in Omaha. At the time of the shooting Cassil was assistant superintendent of a department, and Casey was head watchman of that plant. Defendant contends that the death of her husband was caused by an accident "arising out of and in the course of his employment" within the meaning of those words as used in the Workmen's Compensation Act. Rev. St. 1913, § 3642. It is conceded by plaintiff that the homicide occurred in the course of Cassil's employment, but it is insisted that it did not arise out of such employment, being, from the standpoint of plaintiff, solely the result of a quarrel between Cassil and Casey over personal matters. The Compensation Commissioner allowed the claim of defendant, but deducted therefrom $1,690 which she had received as insurance carried by plaintiff on the life of her husband. From the award of the Compensation Commissioner plaintiff appealed to the district court for Douglas county. There the claim of defendant was disallowed. From a dismissal of the proceeding she has appealed to the Supreme Court.

The district court found that the death of Cassil arose out of a personal quarrel between him and Casey, and held that therefore defendant was not entitled to compensation. On review what is the effect of this finding? The Workmen's Compensation Act provides:

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Any appeal from such judgment shall be prosecuted in accordance with the general laws of the state regulating appeals and actions at law except that such appeal shall be perfected within thirty days." Rev. St. 1913, § 3680, as amended by Laws 1917, c. 85, § 15.

The Workmen's Compensation Act further provides:

"All disputed claims for compensation or for benefits under this article must be submitted to the Compensation Commissioner for an award. If either party at interest is dissatisfied with the award of the Compensation Commissioner, then the matter may be submitted to the district court of the county which would have jurisdiction of a civil action between parties either at or during a regular term of the district court of said county or during any portion of time between the regular term time of the district court of said county, which court shall have authority to hear and determine the cause as in equity and enter final judgment therein determining all questions of law and fact in accordance with the provisions of this article, which judgment shall be final and conclusive unless reversed dismissed, or modfied, on appeal or otherwise modified pursuant to the provisions of this act." Rev. St. 1913, § 3678, as amended by Laws 1919, c. 91, § 5.

These provisions, in connection with the Workmen's Compensation Act as a whole, were intended to simplify the procedure in cases of this kind and to do away with a jury in determining the issues. Any appeal from the judgment of the district court, however, must be prosecuted in accordance with the general laws of the state regulating appeals in actions at law. It follows that a finding of the district court on an issue of fact in a compensation case should not be set aside on appeal where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the finding is clearly wrong. Manning v. Pomerene, 101 Neb. 227, 162 N. W. 492; Miller v. Morris & Co. 101 Neb. 169, 162 N. W. 417; Kanscheit v. Garrett Laundry Co., 101 Neb. 702, 164 N. W. 708; Anderson v. Kiene, 103 Neb. 773, 174 N. W. 301. This is the general rule elsewhere. L. R. A. 1916A, note, p. 266. It is adopted here as being in harmony with the Workmen's Compensation Act of this state.

In the present case there is ample evidence to sustain the judgment from which defendant has appealed. With the issues of fact thus determined, there is no error in the record.

Affirmed.

Aldrich and Day, JJ., not sitting.

ROSE, J. (dissenting). I interpret the Workmen's Compensation Act to mean that an appeal from the Compensation Commissioner shall be tried in the district court, as a suit in equity. The district court, says the statute, "shall have authority to hear and determine the cause as in equity." In my opinion the Legislature, having made the appeal from the Compensation Commissioner to the district court a suit in equity, did not intend to make the appeal from the district court to the Supreme Court an appeal in an action at law, and thus prevent a trial de novo here. The proceeding, being designated by the Legislature as one in equity should be reviewed in the Supreme Court without regard to the findings of fact by the district court. The opinions in Miller v. Morris & Co., 101 Neb. 169, 162 N. W. 417, Kanscheit v. Garrett Laundry Co., 101 Neb. 702, 164 N. W. 708, and Anderson v. Kiene, 103 Neb. 773, 174 N. W. 301, were rendered without referring to that part of the Workmen's Compensation Act requiring the district court to try cases of this kind as suits in equity, and should in my view of the law be overruled.

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I have considered the evidence in the present case with care, and while there is sufficient proof to sustain the findings below, I am fully convinced that the preponderance of the evidence is in favor of defendant, that the quarrel which resulted in the death of Cassil arose out of his employment, and that defendant is entitled to compensation. For these reasons, as I view the law and the facts, the judgment of the district court should be reversed.

UPDIKE GRAIN CO. v. SWANSON. (No. 21443.)

(Supreme Court of Nebraska. June 7, 1920.)

178 Northwestern Reporter, 618.

(Syllabus by the Court.)

1. MASTER AND SERVANT—"DELINQUENT PAYMENT" UNDER COMPENSATION ACT DEFINED.

Under a statute providing that a penalty be added for all delinquent payments under the Workmen's Compensation Act (Rev. St. 1913, § 3666, as amended by Laws 1917, c. 85, § 9½, and Laws 1919, c. 91, § 4), *held* that, where there is a reasonable controversy between the employer and the employee as to liability for certain installments of compensation, the payments of such compensation do not become due, in the sense that they may become delinquent, until the obligation of the company is definitely ascertained or settled.

(For other cases, see Master and Servant, Dec. Dig. § 391½, New vol. 7A Key-No Series.)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT HELD NOT ENTITLED TO ATTORNEY'S FEES.

Where a statute allows the employee to recover attorney's fees, in case an order for compensation is made in his favor, and in event the employer refuses to abide by the order, but appeals, and on appeal fails to reduce the award, *held*, that, the power to allow attorney's fees being statutory, the court has no authority to allow them where the employe himself appeals, though by such appeal the award is increased, nor to allow fees where it is shown that the employer, upon the rendition of the award, instead of appealing, offers to pay it.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

Appeal from District Court, Douglas County. Sears, Judge.

Action by Albert Swanson against the Updike Grain Company to recover under the Workmen's Compensation Act a penalty for delinquency in the payment of compensation and to recover attorney's fees. Relief denied, and Swanson appeals. Affirmed.

See, also, 103 Neb. 872, 174 N. W. 862.

Myers & Mecham, of Omaha, for appellant.

Gurley, Fitch West & Hickman, of Omaha, for appellee.

FLANSBURG, J. Action to recover under the Workmen's Compensation Act (Rev. St. 1913, § 3666, as amended by Laws 1917, c. 85, § 9½, and Laws 1919, c. 91, § 4), a penalty by reason of alleged delinquency in pay-

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ment of compensation, and to recover attorney's fees. The trial court denied the relief, and Swanson, the petitioner, appeals.

The case is presented here on the transcript alone, showing the petition of Swanson, the answer of the company and the decree of the court. No reply was filed, and the allegations of new matter in the answer therefore stand admitted.

Swanson, while an employee of the Updike Grain Company, was injured July 12, 1918. The company recognized its liability and paid to him his medical and hospital expenses, and $12 per week for a period of 17 weeks. On July 11, 1919, the company filed a petition with the Compensation Commissioner praying that definite award be fixed. The commissioner fixed the award at $12 per week for a period of 30 weeks, and, as the company had made payments for 17 weeks only, it developed, under this award, that the company was liable for 13 additional weeks, during a period prior to the rendition of the award, and which payments it had not, in fact, made. Swanson appealed to the district court, where the award was affirmed.

The company, it appears, was satisfied with and was ready and willing to abide by both the award of the Compensation Commissioner when rendered, and the judgment of the district court affirming it and offered payment at that time of the amounts determined to be due.

Swanson again appealed from the judgment of the district court to the Supreme Court, and on November 15, 1919, the Supreme Court increased the award by ordering payments of $12 per week for a period of 45 weeks over and above what had been allowed by the Compensation Commissioner and the judgment of the district court, making a total award of $12 per week for 75 weeks. Updike Grain Co. v. Swanson, 103 Neb. 872, 174 N. W. 862. Upon the filing of the mandate in the district court, the company paid all installments, with interest, for the 13 and 45 weeks, as required under the increased awards.

[1] The statute (Rev. St. 1913, § 3666, as amended Laws 1917, c. 85, § 9½) reads as follows:

"Except as hereinafter provided, all amounts of compensation payable under the provisions of the article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of the injury or death. Provided, fifty per centum shall be added for waiting time for all of delinquent payments after 30 days notice has been given of disability."

The words "of disability" were added by the amendment effective in July, 1919 (Laws 1919, c. 91, § 4).

Did the installments for the 13 and 45 weeks, provided for under the increased awards, become delinquent within the provisions of that statute?

The statute contemplates some sort of notice to the employer or knowledge of the duty required of him, and 30 days' opportunity to act, in order that he may perform the duty and avoid default and the resulting penalty. It is argued that no notice was required in this case, since the employer is shown to have been fully apprised of the injury and the disability resulting. We need not take up the question of notice, as we find that in no event was there any delinquency on the part of the company.

The company paid the medical bill and hospital expenses and installments for 17 weeks. It does not appear that Swanson made demand or claimed to be entitled to further payments. On the other hand, it is the company that instituted the proceedings before the Compensation Commissioner for the purpose of procuring a definite determination of the amount due. The company did not, until the time when the award was made, have notice that it was liable for 30 installments, instead of 17; nor can it be said that these additional installments become due prior to the award, since the liability of the company until that was uncertain.

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When Swanson appealed from the judgment of the district court, it is true the company was aware of the fact that he was claiming more than the district court had given him. What Swanson's exact claim at that time was, however, does not appear.

It seems sufficient to say that all that could at that time be expected of the company was to offer payment of what the district court said was due. Whether that amount would be increased by the Supreme Court was not known. There was nothing definite, over and above the award for 30 weeks, upon which the company could act. The total amount of liability, or the number of installments, which would, in the end, be required to be paid, was still undetermined.

It cannot be said that the company was in default of those payments, over which there was a reasonable controversy, and especially when the district court had decided that the company was liable for 30 weeks only. It cannot be said that these controverted installments, the 45 additional installments, became due until the decision by the Supreme Court allowing them was rendered, and the judgment entered accordingly in the district court. The company promptly offered payment of the award fixed by the Compensation Commissioner and the judgment of the district court, and, when the award was increased to 75 weeks in the Supreme Court, paid the amount in full. Under such circumstances, the company was not delinquent in its payments, nor could it be subjected to the statutory penalty.

It was not intended by this provision of the statute that an employer should comply with every demand of the employee at his peril, and in every case, when it is later proven that the employer was mistaken as to his liability, that he should be required to increase the award 50 per cent. and be penalized in that amount. The statute was not intended to prevent the employer from having a fair opportunity to be heard and to have his just controversies tried, but, as said in United States Fidelity & Guaranty Co. v. Wickline, 103 Neb. 21, 170 N. W. 193, the penalty is provided "to make it thereby reasonably certain that the payments would not be delayed for trivial reasons and the act be thereby nullified." To say that the employer has been delinquent in providing compensation carries with it the idea that he has failed to perform his duty. An installment of compensation cannot become delinquent until it becomes due, and it cannot be said to be due until there is some reasonable certainty as to the amount and the number of payments to be made. Cornell v. Maverick Loan & Trust Co., 95 Neb. 9, 144 N. W. 1072; 18 C. J. 475.

[2] The petitioner further claims to be entitled to attorney's fees. The right to tax attorney's fees is purely statutory. O'Brien v. Industrial Ins. Department, 100 Wash. 674, 171 Pac. 1018; State v. District Court of St. Louis County, 129 Minn. 423, 152 N. W. 838; Friedman Mfg. Co. v. Industrial Commission, 284 Ill. 554, 120 N. E. 460 The statute (Rev. St. 1913, § 3666, as amended Laws 1919, c. 91, § 4) provides that, where the employer refuses to abide by the award of the Compensation Commissioner and appeals, but fails to reduce the award, the employee shall, in such event, be allowed to recover attorney's fees.

The appeal in this case was not taken by the company, nor did it refuse to abide by any award made, and the provisions of the statute do not apply.

It is therefore ordered that the judgment be affirmed.

Aldrich, J., not sitting.

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VERSCHLEISER v. JOSEPH STERN SON, INC., et al.

(Court of Appeals of New York. June 1, 1920.)

128 Northeastern Reporter 126

MASTER AND SERVANT—INJURY IN RESENTING ASSAULT BY COEMPLOYEE HELD TO ARISE OUT OF AND IN COURSE OF EMPLOYMENT WITHIN COMPENSATION ACT.

Where an abattoir worker, resenting a sudden assault by a coemployee who threw a piece of flesh, used the flesh in striking another employee, believed to be the assailant, who in turn kicked claimant, the injury was one arising out of and in the course of employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

McLaughlin, J., and Hiscock, C. J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Law for compensation by Morris Verschleiser, opposed by Joseph Stern Son, Incorporated, employer, and Zurich General Accident & Liability Insurance Company, Limited, insurance carrier. From an order of the Appellate Division reversing by a divided court an award made by the State Industrial Commission, the Commission appeals. Order of the Appellate Division reversed, and award of the Industrial Commission affirmed. 188 App. Div. 937, 176 N. Y. Supp. 41.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for appellant.

John N. Carlisle, of Albany, for respondent.

ELKUS, J. On June 7, 1918, Morris Verschleiser, the claimant, was employed by Joseph Stern Son, Incorporated, at its abattoir in the city of New York on the eighth floor, known as the killing floor. It appears that after each animal is killed it is the practice to cut it open and immediately disembowel it, separating the various portions. It was the duty of the claimant, who was known as a "trucker" or "lugger," to gather the bellies on his truck and truck them to a hole or chute down which he threw them to the seventh floor.

At the time in question the claimant was standing beside his truck, waiting for the "belly" of an animal being cut up by one Mandelheim. Also waiting in line, apparently for other portions of viscera, was another trucker, Dudler.

One Louis E. Baxter, who at the time was commissioned as a veterinary inspector of the United States government, was stationed at the slaughterhouse, and in charge of the entire building so far as government inspection was concerned. While the claimant was waiting to have his truck loaded, some one—and the Industrial Commission has found —a fellow employee of claimant, dropped a piece of flesh about two feet long arond the neck of claimant. There is some testimony that this may have been done by the veterinary. The claimant resented the insult and assault upon him, and, in his excitement, believing the attack to have been

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made by Dudler, went over to him and struck him sveral times with the piece of flesh, and then threw it down. Dudler thereupon kicked the claimant, causing the injuries complained of. Dudler's hands were occupied so he used his feet.

The state Industrial Commission did not find as to who began the assault upon claimant, and, in his opinion, Commissioner Lyon states:

"Under the circumstances here disclosed, I do not think it necessary to determine who began the melee. Certainly the claimant did not begin it."

It appears that prior to this pieces of fat were thrown at the claimant by Dudler and others. The claimant testified that Dudler used to peck at and aggravate him, and he told him to let him alone. About 20 minutes before the claimant received his injury, Dudler, he says, ran his truck into the one claimant was pushing, and he (claimant) says that when he felt the pieces of flesh on his neck, he exclaimed, "Why don't you let me work?" and threw the pieces of flesh down; that Dudler was standing next to him, and then kicked him.

The Industrial Commission claims that this case falls within Matter of Carbone v. Loft, 174 App. Div. 901, 159 N. Y. Supp. 1104, affirmed 219 N. Y. 579, 114 N. E. 1062, and Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. The order of reversal by the Appellate Division, Third Department, is based upon Matter of Stillwagon v. Callan Bros., 183 App. Div. 141, 170 N. Y. Supp. 677, affirmed 224 N. Y. 714, 121 N. E. 893. Griffin v. Roberson & Son, 176 App. Div. 6, 162 N. Y. Supp. 313; and Matter of De Filippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761, affirmed 219 N. Y. 581, 114 N. E. 1064. This reversal was by a divided court.

In Matter of Carbone v. Loft, 174 App. Div. 901, 159 N. Y. Supp. 1104, affirmed 219 N. Y. 579 114 N. E. 1062, claimant became engaged in an exchange of insulting language with a fellow employee, who about three-quarters of an hour later violently attacked claimant, with the resulting injuries for which recovery was demanded. The recovery was allowed.

In Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344, the facts were that a driver brought his horses into the employer's stable, where a fellow workman and he unharnessed them and proceeded to wash them off with a hose. The driver, claimant, told the fellow workman he was using too much water on the horses, and then the fellow workman intentionally sprinkled water on the claimant. The claimant, having temporarily left the stable yard, was returning to his work, when he met the fellow workman. The claimant touched him on the shoulder, saying, "Don't do that again," whereupon the fellow workman slapped the claimant on the shoulder, and, as the claimant turned around the man's finger stuck in claimant's eye, causing severe injury. This court held this injury was accidental and within the meaning of the statute. It was sudden and unlooked for, and the purpose of the act is to insure the workman at the expense of the employer against personal injuries, not expected or designed by the workman himself, provided such injuries arise out of and in the course of employment. The opinion, however, was careful to say that it was an obligation of claimant's employment to take care of the horses which he drove, and to see that they were not injured by injudicious wetting or otherwise by his fellow workmen; that in the course of their employment while the two men were at work a quarrel or argument arose over the wetting of the horses, and personal injury grew out of the physical contact resulting from the quarrel and that therefore the accident grew out of and in the course of employment.

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In Matter of Stillwagon v Callan, 183 App. Div. 141, 170 N. Y. Supp. 677, affirmed 224 N. Y. 714, 121 N. E. 893, the injury was the result of an assault initiated by the deceased, Stillwagon, and he could not be the beneficiary of his own wrongful act when that act was not committed in aid of or in the scope of his work.

Griffin v. Roberson, 176 App. Div. 6, 162 N. Y. Supp. 313, was another case where the claimant initiated the assault which resulted in his own injury and death. In that case the court well stated the distinction between this line of cases and the cases of Matter of Carbone v. Loft and Matter of Heitz v. Ruppert:

"It has been held in different cases that when a servant in the course of his employment is assaulted by another he may sometimes be entitled to compensation. Such was the case of Carbone v. Loft, decided without opinion by this court. * * *. This is on the theory that the injured servant is protecting his master's property or promoting his master's interest, or that the assault on him was in some way incidental to the duty which he owed his master." 176 App. Div. 7, 162 N. Y. Supp. 314.

In Matter of De Filippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761, affirmed 219 N. Y. 581, 114 N. E. 1064, the injury did not happen in the course of the employment. It did not happen in the workroom of the employer, but in an adjoining toilet, for the convenience of the work people. It was not due to any unsafe conditions of the toilet maintained by the employer, but solely to the personal act of a fellow servant. A pair of scissors was thrust through a partition, striking claimant in the eye.

In the instant case the claimant was not the aggressor, but was attending to his master's business on his master's premises at the time of the assault. He was waiting to "lug" away viscera, and while waiting there for his master's benefit and in the work for which he was employed was assaulted. In his excitement he defended himself by a counter attack upon, as it seems, another employee, with the resulting injury to himself. He did not initiate the "melee," but was desirous only of transacting his master's business in peace. This fellow employee had previously, he claimed, interfered with his working. The Industrial Commission has found that claimant was engaged in the regular course of his employment when he was kicked. This is a finding of fact. The claimant was thrown on the defensive, striking Dudler with the piece of flesh, who kicked him. If the claimant was right in assuming that Dudler was his assailant, his striking back would have been the natural result of the act, and it might then well be said that claimant was within the act.

The Workmen's Compensation Law (Consol. Laws, c. 67) should be construed broadly. Compensation under it does not depend on any fault of the master or any negligence of the servant. The law was enacted to do away with the defenses which had goverened the law of master and servant. The question in each case arising under the Workmen's Compensation Law is, "Was the injury received while engaged in the master's business?" If the servant had left his employment and was wilfully pursuing designs of his own, he would not be entitled to compensation. The man who initiates an assault is doing a willful thing, but this cannot be said of the man who, surprised by physical assault or insult, reacts and in self-protection strikes another. His act is as involuntary as that of closing the eye to avoid dust ,the same action and reaction which the law recognizes in its definition of manslaughter.

Danger of employment in modern business comes from the gathering together of great and dangerous machines. There is a line of cases which hold that if an employer continues to employ a man of dangerous temper after he has become aware of the same ,and he inflicts injury on

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a fellow workman, the workman will be entitled to recovery under the Compensation Act. This, however, is a retrogression to the old master and servant law, and clearly against the intent of the Workmen's Compensation Law, which does not look for fault, but merely insures workmen in certain employments.

In the instant case the injury was the result of provocation and passion engendered between employees in the course of their employment on the premises of the employer while engaged in their daily work. McIntyre v. Rodger 41 Scot. L. Rep. 107; Pekin Cooperage Co. v. Industrial Commission, 285 Ill. 31, 120 N. E. 530.

Under the circumstances of the instant case a workman at work for his master, who sustains injury because of his environment, is entitled to recover. This right to recover is not nullified by the fact that his injury is augmented by natural human reactions to the danger or injury threatened or done.

The purpose of the Compensation Act was to benefit certain workmen otherwise without legal recovery. Under its provisions they may receive compensation independent of the fault of the employer at common law or other statutes.

As Judge Pound said in the Matter of Heitz v. Ruppert, 218 N. Y. 148, 154, 112 N. E. 750, 752 (L. R. A. 1917A, 344), speaking of the effect and purpose of the Compensation Act:

"The law has been and should be construed fairly, indeed liberally. in favor of the employee. Against its justness or economic soundness nothing can be said."

It may seem harsh and arbitrary to impose liabilty upon a master for an assault committed by a workman upon a coworkman, but the purpose and intent of the statute is to fix an abitrary liabiltiy in the greater public interest involved. This legislation was to ameliorate a social condition—not to define a situation or fix a liability by an adherence to the old common law. Liability was imposed regardless of fault—vitally different from that under the common law. Injury by an employee moved by some cause aside from his regular duties, may be considered an inevitable, however undesirable, result—a risk which is incident to the employment of many persons. It is a burden which industry may well bear under this legislation. Hulley v. Moosbrugger, 87 N. J. Law, 103. 93 Atl. 79; Thorn v. Sinclair, A. C. 127; Pekin Cooperage Co. v. Industrial Board, 277 Ill. 53, 115 N. E. 128; Knopp v. American Car Co., 186 Ill. App. 605, 29 Yale Law Journal, 672. The claimant is entitled to the benefit of the act.

The order of the Appellate Division should be reversed and the award of the Industrial Commission affirmed, with costs in this court and Appellate Division.

McLAUGHLIN, J. I dissent. This case in principle cannot be distinguished from Matter of Stillwagon v. Callan Bros., 183 App. Div. 141, 170 N. Y. Supp. 677, affirmed on opinion below, 224 N. Y. 714, 121 N. E. 893. In that case the deceased and a fellow employee were each running a motortruck and had gone from the premises of the employer for the purpose of loading their trucks with brick from cars standing on a railroad track. They got into an altercation as to their respective rights to first load, each claiming that right. According to the findings of the commission, "After a short battle of words, the two men came to blows and in the melee Henry Stillwagon was struck by his fellow employee and knocked down" and so injured that he died a short time thereafter. The award made by the commission was reversed by the Appellate Division, that court, as appears from the prevailing opinion, holding that the injury resulted solely because Stillwagon in serving

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his own purpose willfuly sought to injure his coemployee and that the statute specifically excepted such injuries from its operation.

In the instant case Verschleiser, while handling some part of the carcass of a slaughtered animal, believing he had been insulted and imposed upon by some of his coemployees, assaulted and struck one Dudler. Dudler had not imposed upon or insulted the claimant; there is no finding to that effect; there is no suggestion to that effect in the evidence; and if we may look to the opinion of the commission it there states that he was not one of the coemployees who had insulted and imposed upon the claimant. After the claimant had assaulted Dudler the latter repelled the attack by kicking him, thus inflicting the injury for which the recovery was sought.

In Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344, this court held that the words "arising out of and in the course of employment" are conjunctive, and relief can be had under the act only when the accident arose both "out of" and "in the course of" employment; that the injury must be received (a) while the workman is doing the duty he is employed to perform; and also (b) as a natural incident of the work; that it must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work. When the facts here involved are subjected to this test, the claimant's case is not within the statute. He was not at the time he was injured engaged in doing the duty he was employed to perform when he stopped his work and made the assault upon Dudler. Nor can it be said that the injury was the natural incident to the work which he was required to perform.

The order of the Appellate Division should be affirmed with costs against the state Industrial Commission.

Hogan, Cardozo, and Crane JJ., concur with Elkus, J., and Chase, J., concurs in result.

Hiscock, C. J., concurs with McLaughlin, J.

Order reversed, etc.

HANSON ET AL. v. FLINN-O'ROURKE CO., INC.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement, 213.

1. MASTER AND SERVANT—DEPENDENCY DETERMINED BY COMPENSATION LAW AT TIME OF ACCIDENT.

Questions of dependency on an employee, who was killed in 1915, must be determined by the law in force at that time, not by the amendment in 1916 to Workmen's Compensation Law, § 17, requiring support to have been given within one year at the time of the accident, and limiting the number of alien dependents.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

2. MASTER AND SERVANT — EVIDENCE HELD TO SUSTAIN FINDINGS OF DEPENDENCY.

Though Workmen's Compensation Law, § 68, permits wide latitude as to evidence received, there must be some legal evidence, in addition to documentary hearsay evidence, received under that section; but testimony

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as to dependency, sufficient to make applicable the presumption of section 21, sustains a finding of dependency in connection with documentary hearsay evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

3. MASTER AND SERVANT — CLAIM DATED WITHIN YEAR PRESUMED FILED IN TIME, BUT NOT CLAIM DATED THEREAFTER.

Where a claim by mother of deceased employee for compensation, with no indorsements indicating date of filing, was dated within one year of the accident, and a joint claim by his mother and a brother was dated more than one year after the accident, it will be presumed, under Workmen's Compensation Law, § 21, that the mother's claim was filed in time, though the brother's claim is too late to sustain an award in his favor.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act (Consol. Laws, c. 67) by Emalia Hanson and another against the Flinn-O'Rourke Company, Incorporated, employer and self-insurer, to recover compensation for the death of Jacob Hanson, an employee. From an award of compensation to both claimants, the employer appeals. Award reversed as to one claimant, and affirmed as to the other.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Charles J. Katzenstein, of New York City, for appellant.

Charles D. Newton, Atty. Gen., and E. C. Aiken, Asst. Atty. Gen. (Bernard L. Sheintag, of New York City, of counsel), for respondents.

KILEY, J. The claimants here are mother and minor brother of the deceased: They are aliens residing in Norway. On the 15th of December, 1915, claimant Emalia Hanson's son, Jacob Peterson, true name Hanson, and about 20 years of age, was injured while in the employ of appellant at its place of business in Brooklyn, N. Y. He died within a few minutes after receiving the injury. The appellants seek the reversal of the award and dismissal of the claims upon three several grounds: (1) That there was no legal proof of dependency; (2) that the notice of claim or claims as required by statute was not filed within the time therein provided; and (3) that, as both alleged claimants were aliens an award could not, in any event, be made to but one of them.

[1] As to the first proposition, questions of dependency shall be determined as of the time of the accident. Birmingham v. Westinghouse Electric & Mfg. Co., 180 App. Div. 48, 167 N. Y. Supp. 520. Section 17 of the law as it now stands requires that support shall have been given within one year of the time of accident causing death; that statute was passed in 1916, after this accident occurred, and hence this question must be considered under the provisions of section 17, chapter 41, of the Laws of 1914 where no such limitation appears.

[2] Much of the documentary evidence offered in behalf of claimants would not have been competent under any rule of law obtaining outside of this statute. Section 68 seems to intend wide latitude and discretion in the commission to be exercised in determining the facts. In Matter of Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735, and Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435,

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113 N. E. 507, Ann. Cas. 1918B, 540, the right to receive hearsay evidence under section 68 of the Compensation Law is recognized; but they hold that there must be some legal evidence of probative character of the facts outside of such hearsay statements. In this case the difficulty is overcome with the evidence of the brother and sister of the deceased, showing or tending to show dependency, sufficient to make applicable the provision for presumptions found in section 21 of the Compensation Law.

Before passing to the second ground urged for reversal, it is suggested that the third ground advanced cannot prevail. Appellant relies on Matter of Skarplelgos v. Counes & Raptis Co., 228 N. Y. 46, 126 N. E. 268. That decision was made after the amendment of section 17, Workmen's Compensation Law, by chapter 622, of the Laws of 1916. This case did not come under the law, and is not governed by that decision.

[3] Under the second alleged ground advanced by appellant as sufficient to reverse the award, it is urged that claimants failed to file their claims with the commission within one year after the death of the son and brother, as required by section 28 of chapter 41 of the Laws of 1914, under which law this proceeding was had. Jacob Peterson (Hanson) was injured, so he died December 15, 1915; the employer's proof of death mentions his mother as his only dependent. it is dated January 17, 1916. The mother makes a claim as dependent dated October 5, 1916. These documents are dated within the year. No mention is made of the alleged dependent brother until January 29, 1917, when what purports to be intended for a claim is signed by both mother and son, claiming compensation. The record shows no indorsement indicating when the mother's claim was filed with the commission. The commission makes no finding as to when the claim of the mother was filed. The brother's claim was not made, in form, until after one year from the death had elapsed, so that the award must be reversed as to him. Under section 21 the presumption can be indulged that the mother's claim was filed before the year elapsed provided by statute as a limitation.

Award reversed as to the alleged dependent brother, and sustained as to the mother, Emalia Hanson. All concur.

INSANA ET. v. NORDENHOLT CORPORATION ET AL.

(New York Supreme Court, Appellate Division, Third Department. July 3, 1920.)

183 New York Supplement, 83.

1. MASTER AND SERVANT—NOTICE REQUIRED BY COMPENSATION ACT HELD ADEQUATE.

In a proceeding for compensation for the death of an employee, ***held***, that the corporate employer, through its superintendent, had knowledge of the accident on the day following, so failure to give notice within 30 days will not, under Workmen's Compensation Act, § 18, preclude compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

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2. MASTER AND SERVANT — INJURY WITHIN COMPENSATION ACT HELD QUESTION FOR INDUSTRIAL COMMISSION.

Whether a fall caused death or it was the result of acute cardiac dilation *held* under the evidence for the Industrial Commission, in view of Workmen's Compensation Act, §§ 21, 68; it appearing death resulted in an hour after a fall on hard substance, as a result of which the employee struck his left breast.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from State Industrial Commission.

Claim by Sebastiana Insana against the Nordenholt Corporation, employer, and the Travelers' Insurance Company, insurance carrier, for compensation under the Workmen's Compensation Act for the death of Giuseppe Insana, employee. From an award of the Industrial Commission for claimant, the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Benjamin C. Loder, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Asst. Atty. Gen., and Bernard L. Shientag, of New York City, of counsel), for respondents.

KILEY, J. [1] The appellants contend that the notice required by statute was not given to the employer, and that death was caused by acute cardiac dilation, chronic valvular disease of the heart, and that the accident alleged to have happened to the deceased in no way contributed toward such fatality. On May 15, 1918, Giuseppe Insana, with others, was working for the appellant, employer, at its pier in Brooklyn, N. Y. They were unloading a cargo of sacks of hard red cement, each sack weighing 145 pounds. Five minutes before quitting time Giuseppe fell 7 or 8 feet from a pile of these sacks, striking his left breast either upon one of the sacks or upon the platform upon which the sacks were piled. He was helped up by his fellow workmen, complained that he had slipped and fell, and hurt himself in the region of the heart. He walked to the ferry, and up a flight of stairs to the elevated railroad, and died in the train. The timekeeper took the names of those there. The assistant foreman of the employer says he hired the deceased to work the day he was injured, and that he heard of his injury before he left for home. He said he did not tell anybody, because his fellow workmen said they would take it up next morning.

Superintendent Marra, of the employer corporation, testified that June 27 was the first knowledge he had of the accident, and that was acquired through a representative of the insurance carrier, appellant herein, for whom he made an affidavit. He was then asked this question:

"That is the first knowledge you had there was a claim? A. Yes; it was. Of course, the next day after the man died, they told me on the job he died on his way home. I didn't pay no attention to it."

It will be noted that the word "claim" is used, not accident. Again:

"He never told you anything about an accident? No, sir."

This evidence is not satisfactory as to the absence of knowledge, but earlier in his testimony he creates a feeling that he had knowledge as soon as the next day:

"No accident whatever was reported at the time, until the next day, we got back to work and some of the employees told me the man died on his way home on the train."

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His examination was to the effect that he did not have notice, not that he did not have knowledge. It is obvious, whether consciously or not, that this evidence fitted the provisions of section 18 requiring affirmative notice, as found in said section before the paragraph commencing with the words "the failure to give notice of injury or notice of death," etc. The statute (Laws 1918, c. 634, § 3) extending the time in which to give notice from 10 to 30 days took effect May 13, 1918, two days before this injury occurred. The employer had such knowledge as is contemplated by the last paragraph of section 18 of the Workmen's Compensation Law (Consol. Laws, c. 67).

[2] As to whether this injury activated a previous bad condition of the heart, and thereby contributed to the sudden taking off of this man, was a question of fact for the commission. Some medical testimony given is to the effect that such injury might produce a condition that might be fatal, and of which this instance is illustrative. Appellants rely on Nestor v. Pabst Brewing Co., 191 App. Div. 312, 181 N. Y. Supp. 477. I cannot escape the conclusion that the circumstances and facts are different in the two cases. Nestor dislocated his shoulder on June 1, 1918, and lived until July 21, 1918. His injury was not in the region of the heart; a dislocated shoulder and contusions of the skin may be had without any shock; a twist of the arm may dislocate a shoulder; a seam in the trousers may abrase the skin; a ball thrown by a boy may produce a painful contusion. The death certificate indicated, nothing more, that Nestor died of heart disease ("chronic cardiac valvular"). He was under the care of a physician; he lived 51 days after the injury, and his phsyician swore that he never had heart disease.

In the case here considered, the shock must have been severe. Insana slipped and fell 7 or 8 feet, striking a hard substance either a cement sack or the floor of the platform, and was dead within an hour thereafter. His mother swore he never had any sickness; any heart disease. She did not know. The physician, Dr. Lewy, was called, and testified, from the facts as presented by the record, that in his opinion he had, and that the injury was such as might hasten death. I do not think 191 App. Div. 312, 181 N. Y. Supp. 477, supra,, is controlling here. It would seem that, if sections 21 and 68 of the Compensation Law are to be accorded any vitality, they apply to the facts in this case.

The award should be affirmed. All concur.

JEDRLINICH v. JAMES SHEWAN & SONS, INC., ET AL.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement, 111.

MASTER AND SERVANT—COMPENSATION CLAIMANT HELD NOT DEPENDENT ON HER SON.

A mother, receiving $5 a week for boarding her 17 year old son, who earned $9 a week and who was given money for clothes and amusements by his father, earning $30 a week, *held* not dependent on the boy, so as to entitle her to compensation for his death.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

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Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act (Consol. Laws, c. 67) by Minnie Jedrlinich, as dependent mother, for compensation for the death of Nicholas Jedrlinich, against James Shewan & Sons, Incorporated, employer, and the Employers' Mutual Insurance Company of New York, insurance carrier. From an award of compensation by the State Industrial Commission, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Blauvelt & Warren, of New York City (Francis J. MacIntyre, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The State Industrial Commission has made an award of $5.77 per week to the claimant, based upon the death of her 17 year old son, who was killed in an accident on the premises of the defendant on the 21st day of June, 1919. The boy was getting $9 a week at the time of his death, and was paying his mother $5 per week for board and lodging. The family consisted of a father and mother, a girl of 14 years of age, and another of 5 years, in addition to the son. The father was earning at least $30 per week; the evidence indicates a considerably larger amount. The father says that he gave the boy money for clothes and amusements, and it cannot be said that the mother of this boy, under these circumstances, was in any degree dependent upon the deceased son. The learned Deputy Attorney General, who is astute in discovering evidence to sustain awards by the State Industrial Commission, does not suggest the presence of any such evidence in this case, and we are unable to find any.

The award should be reversed. All concur.

STATE INDUSTRIAL COMMISSION et al. v. WISEMAN et al.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement 112.

1. MASTER AND SERVANT — COMPENSATION CLAIMANT HELD AN INDEPENDENT CONTRACTOR.

Claimant, who hauled garbage in his own autmomobile truck, for which he furnished gasoline, it appearing the cans were handled by others, *held* an independent contractor, though paid $25 for himself and truck, and so was within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT HAULING GARBAGE HELD A "FARM LABORER," WITHIN STATUTE.

Claimant, who hauled garbage in an automobile to his employer's farm, where it was fed to pigs *held a "farm laborer,"* within the Work-

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men's Compensation Act, just as much as if he was hauling other feed; the employer purcasing the garbage paying partly in money and partly in service of removal.

(For other cases, see Master and Servant, Dec. Dig. § 363.)

(For other definitions, see Words and Phrases, Second Series, Farm Laborer.)

Kiley, J., dissenting in part.

Appeal from State Industrial Commission.

Claim by Gustave A. Halletz against Lafayette Wiseman, employer, and the New Amsterdam Casualty Company, insurance carrier, for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67). From an award of the State Industrial Commission for claimant, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Frederick Mellor, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York, of counsel), for respondents.

KILEY, J. The employer, Wiseman, was a stock farmer at Union Corners, Bronxville, N. Y. The employee, claimant, was a chauffeur on auto truck working for the employer, and on January 22, 1919, while unloading merchandise, he fell from the truck and sprained and lacerated his ankle. The employer had a contract with the United States government to take from Pelham Bay Camp garbage in iron or tin containers, he paid something for the garbage and carted it to his farm to feed his pigs. Claimant owned a five-ton truck; he was employed by Wiseman, his employer, to drive the truck and draw the cans to his employer's farm. Claimant did not handle the cans, either loading or unloading, and had nothing to do with the disposal of the contents after they reached the farm. He received $25 a day, and furnished his truck, gasoline, etc.

[1] Appellant insurance company urges that claimant was either engaged in farming, which is not a hazardous occupation, or that he was an independent contractor, and therefore it is not liable for compensation. Passing on the last proposition first: In my opinion the claimant was not an independent contractor. McNally v. Diamond Mills Paper Co., 223 N. Y. 83, 119 N. E. 242. The majority of my Associates do not agree with me on the proposition, however.

[2] The argument that claimant was, in effect, a farm laborer presents greater difficulty. The employer was engaged in extensive and intensive farming; he ran his farm for profit, raising hogs for market; he purchased this garbage from the government to feed those hogs, paid for it, part in money and part in labor, which he hired the claimant to perform. Claimant was in no different position, performing those services than if he had been sent to the feed store for a load of feed with which to feed the hogs on the farm. My conclusion is that claimant was engaged in farm labor. I find no similar case, but Casterline v. Gillen, 182 App. Div. 105, 169 N. Y. Supp. 345, and Brockett v. Meitz, 184 App. Div. 342, 171 N. Y. Supp. 412, are indicative of this solution.

The award should be reversed, and claim dismissed. All concur.

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LEONBRUNO v. CHAMPLAIN SILK MILLS et al.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.

183 New York Supplement 222.

1. MASTER AND SERVANT—"ACCIDENT," WITHIN COMPENSATION LAW, DEFINED.

The accident must have arisen both out and in the course of employment, to render employer liable under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

2. MASTER AND SERVANT—INJURY BY FELLOW SERVANTS ENGAGED IN HORSE PLAY HELD WITHIN COMPENSATION LAW; "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where an employee, while devoting his time to his work, was struck in one eye by an apple thrown by fellow servants engaged in horse play, the injury was one "arising out of and in the course of his employment," within Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Kiley, J., dissenting.

Appeal from State Industrial Commission.

Proceeding under Workmen's Compensation Law by Salvatore Leonbruno for compensation for injuries, opposed by the Champlain Silk Mills, employer, and the American Mutual Liability Insurance Company, insurer. Award by the State Industrial Commission for the claimant, and employer and insurer appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Jeremiah F. Connor, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The State Industrial Commission have found as conclusions of fact that on the 15th day of August, 1919, Salvatore Leonbruno was working for his employer at the plant, and while engaged in the regular course of his employment, cleaning machinery, and while devoting all of his time to his occupation, two fellow servants were engaged in horse play in the same room with him, and one of his fellow servants threw a piece of apple at the other, and the piece of apple struck Leonbruno in the left eye, tearing the iris thereof, and producing a hemorrhage in the exterior chamber of the left eye. It was found as a fact, likewise, that at no time did the claimant participate in the horse play carried on by his fellow servants, nor did he have knowledge of the same.

[1, 2] The employer and insurance carrier appeal from the award and, while conceding that the injury occurred while the claimant was doing the work he was employed to perform, urge that the injury was not a natural incident of the work, because it was not due to any risk connected with the employment, and was in no manner connected with the work. In view of the purpoes sought to be served by the Workmens'

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Compensation Law (Cons. Laws, c. 67), the disposition is to sustain awards which come within the spirit of the act, where this is consistent with its letter; but the requirement of the statute is that the accident must be one "arising out of and in the course of his employment" (section 10), and both conditions must concur. Matter of Heitz v. Ruppert, 218 N. Y. 148, 151, 112 N. E. 750, L. R. A. 1917A, 344. The claimant was, it appears, attending strictly to his work; he was not in any sense a party to the horse play going on about him. But since the world began men have indulged in more or less horse play or pranks during the hours of labor, and it is as much an element of risk in an occupation as any other element that enters into such risks. One of the main objects of this law is to assure compensation where there is legal liability.

The award should be affirmed. All concur, except

KILEY, J. I respectfully submit that Matter of De Filippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761; affirmed in 219 N. Y. 581, 114 N. E. 1064, controls on this appeal rather than Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. In the Heitz Case conditions, conversations, and acts preceding the accident were with reference to service then being performed and as to how it should be performed. Not so here. Nothing could be more foreign to the service than the means used to cause the accident. Such was the principle upon which the De Filippis Case was decided, and is against the claimant in this case.

I dissent, and advise reversal.

MARTIN et al. v. HENRY CARD & CO. et al.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement 88.

MASTER AND SERVANT—TRUCK DRIVER HELD ENTITLED TO COMPENSATION FOR INJURY WHILE USING OWN CAR.

Factory employee, obligated on Sunday to look after fires and lights, and to see that everything was in working order for Monday, when he would drive truck of employer, injured in cranking his own car to go from the factory to a garage to get spark plugs for the truck, *held* entitled to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Appeal from State Industrial Commission.

Proceeding by Bert O. Martin for compensation under the Workmen's Compensation Act (Consol. Laws, c. 67), opposed by Henry Card & Co., the employer, and the Travelers' Insurance Company, the insurance carrier. From an award of compensation made by the State Industrial Commission, the employer and insurer appeal. Award sustained.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

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Benjamin C. Loder, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Asst. Atty. Gen., and Bernard L. Sheintag, of New York City, of counesl), for respondents.

KILEY, J. Previous to June 29, 1919, the claimant, Bert O. Martin worked for Henry Card & Co., at Fredonia, N. Y. His contract was for the seven days of the week. The seventh day, Sunday, it was his business to go to factory and look after fires and lights, and I think it may be fairly inferred that he had to see that everything, so far as his part of the business was concerned, was in working order for Monday morning. He drove the truck used by his employer in the business. On the Sunday in question he had to get spark plugs for the truck before he could use it on Monday morning. He had a Ford car of his own, and it was there at the factory; the spark plugs were not kept at the factory, and, as it was Sunday, he had to go and look for them in some garage where the kind he wanted might be found. He started to crank up his Ford car, so that he could go and find the plugs. It backed fire, kicked, and broke both bones of his right wrist.

Appellants contend that this accident did not arise out of, and was not incident to, the business he was employed to help carry on; in other words, that claimant ought to have walked around from garage to garage, looking for spark plugs for them, instead of riding in his car while so doing. In the matter of Glatz v. Stumpp, 220 N. Y. 71, 114 N. E. 1053, while reversing the award of the Industrial Commission, we laid down this rule:

"In order to charge the employer with liability under the Workmen's Compensation Law, the court must be able to see that the hazards which accompanied the duties of the employee have turned against him, to his loss and damage."

The circumstances that inspired this holding were briefly as follows: The claimant was employed as driver on a delivery wagon for a florist; he made a delivery , and then mounted a ladder to assist in placing the flowers or plants in boxes; he lost his balance, fell, and sustained the injury, for which the commission made him an award. In this case, while the uses of the car would find the plugs in a shorter period of time than if he had walked, yet the job he started to do had to be done for the employer, to the employer's advantage, and with no pecuniary advantage to himself.

The award should be sustained. All concur.

NEUBERGER v. THIRD AVE. RY. CO.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement 348.

MASTER AND SERVANT — EMPLOYEE BURNED DURING DIZZY SPELL HELD NOT INJURED IN EMPLOYMENT WITHIN COMPENSTAION ACT.

Carpenter, subject to dizzy spells for two years and under medical treatment for a year, who, having placed coffee pot on stove of employer to heat it for lunch, got a dizzy spell and put his hand on the stove

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for protection, *held* not injured in the course of his employment, so as to entitle him to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

John M. Kellogg, P. J., and Woodward, J., dissenting.

Appeal from State Industrial Commission.

In the matter of the claim of Harry Neuberger for compensation under the Workmen's Compensation Act (Consol. Laws, c. 67), opposed by the Third Avenue Railway Company, the employer and self-insurer. From awards of the State Industrial Commission, the employer and self-insurer appeals. Awards reveresd, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Alfred T. Davison, of New York City (John J. O'Connell and Alex R. Jones, both of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Asst. Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J., The awards must be reversed, because the accident did not arise out of the employment. Claimant was a carpenter, accustomed to eat his noonday meal on the premises of the employer. He had placed his coffee pot on the stove to be heated. He describes the accident as follows:

"Just as the whistle blew I got a dizzy spell, and fell over and put my hand on the stove and burnt it."

In previously describing the accident, and in answer to a question as to how it happened, he said: "Through dizziness in the head." The stove is sometimes spoken of as the "glue pot." Again, in describing the the accident, the claimant said:

"I went to get my coffee, and I had a spell, and I fell in the glue pot. * * * I didn't fall; I put my hand on the glue pot for protection."

He further testified that he was subject to these "spells" and had them "once in three months"; that they lasted "a minute, sometimes not even a minute"; that he had been subject to the spells about two years, and had been under medical treatment for them about one year; that when he had them he lost control of himself completely; and that it was during one of these spells that his hand went into the "glue-pot." The foregoing is all the testimony in explanation of the accident.

The award was made on the authority of Matter of Santacroe v. Sag Harbor Brick Works, 182 App. Div. 442, 169 N. Y. Supp. 695. In that case the claimant fell from a pile of bricks about 15 feet high. He was in good health, and was made dizzy and caused to fall because of the elevated position in which he was working. The nature of the work caused the dizziness. In the instant case there was nothing in the environment or the nature of the work which caused the accident. The dizziness or "spell" was a characteristic malady inherent in the claimant, overtook him at intervals without reference to his employment.

In matter of Minerly v. Kingsbury Construction Co., 191 App. Div. 618, 181 N. Y. Supp. 901, the employee was subject to fits. He was found drowned in the river under circumstances indicating that he must have fallen into the river as a result of his malady. An award was reversed, because the accident did not arise out of employment. That case was stronger for the claimant than the present case, because there the accident was a matter of inference from circumstances, while here the testimony

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of the claimant makes it plain that the accident was not due to the employment, but to his characteristic malady. In the light of the Minerly Case, and of the authorities there cited, further discussion seems unnecessary.

The awards should be reversed, and the claim dismissed.

Henry T. Kellogg and Kiley, JJ., concur.

JOHN M. KELLOGG, P. J. (disenting). We cannot review the decision of the commission on a question of fact. The only question for consideration is: Was there any evidence to sustain the finding. And in determining that question the most favorable view of the claimant's testimony must be taken. Apparently the "glue pot" is a stove in the carpenter shop upon which the glue pot is heated. The claimant warmed his bottle of coffee in the oven or upon the stove. At the noon hour he started for the stove to get his bottle of coffee. Presumably others made a similar use of the stove.

He never had fits; but, as he calls it, he had spells of weakness or dizziness. He had never fallen in one of them; they lasted sometimes only a second, as he says a slight snap of your finger, but at times continued for a minute, perhaps two minutes. The company had full knowledge that he had these spells, and employed him with that knowledge, and permitted him to use the glue pot or the stove for heating his coffee. At the time he burned his hands he did not fall,, but, feeling his spell coming on, he reached out his hand at the nearest object for protection, with the result that it was burned upon the glue pot. The accident came from the fact that a man, subject to these weaknesses, was permitted by the company to heat his coffee at the glue pot, and that no other place was furnished for that purpose.

I think, within the spirit of the Workmen's Compensation Law, the award should stand.

Woodward, J., concurs.

PRIGLISE v. FONDA, J. & G. R. CO.

(New York Supreme Court, Appellate Division, Third Department, July 8, 1920.)

183 New York Supplement 414.

MASTER AND SERVANT—INJURY TO FLAGMAN ATTEMPTING RESCUE ON TRACK OF ANOTHER RAILROAD HELD NOT TO "ARISE OUT OF AND IN COURSE OF EMPLOYMENT," WITHIN COMPENSATION ACT.

Where two railroads maintained parallel tracks 50 feet apart over a crossing, and each maintained a flagman to keep people off its tracks, death of one of the flagmen while attempting to rescue a child on the tracks of the other railroad did not "arise out of and in the course of his employment," within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

John M. Kellogg, P. J., dissenting.

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Appeal from award of State Industrial Commission.

Proceeding by Sebastiana Pulos Priglise under the Workmen's Compensation Act (Consol. Laws, c. 67) to obtain compensation for death of a servant ,opposed by the Fonda, Johnstown & Gloversville Railroad Company, employer and self-insurer. There was an award of compensation, and the employer appeals. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Charles S. Nisbet, of Amsterdam, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. At the place of the accident the appellant operates a double-track electric railroad, parallel with and contiguous to the four-track electric railroad of the New York Central Railroad Company. The two railroads are crossed by a public highway, and except at the highway intersection are separated from each other by a line fence. The railroads extend easterly and westerly, and the highway nearly northerly and southerly. The railroad of the appellant is the southerly one of the two. The distance between the two sets of tracks is about 50 feet. The New York Central crossing is portected by gates raised and lowered by a gateman stationed north of the track and west of the highway. The crosing of the appellant was not provided with gates, but was protected by a flagman or watchman, who, when his duties did not otherwise require, usually sat on the north side of the appellant's tracks and east side of the highway, because from that position he could to better advantage guard the crossing. The deceased employee. Priglise, was the flagman or watchman at this crossing.

On the occasion of the accident some school children approached the New York Central crossing from the north, and waited for a freight train to pass on the northerly track. After it had cleared the crossing they proceeded southerly. Another freight train was approaching on the southerly track of the same railroad. The gateman guarding that crossing shouted to the children to stop. The evidence is conflicting as to whether the gates at that time were up or down. The fact is immaterial as far as this case is concerned. Two of the children, being brothers, did not heed the warning, but attempted to cross in front of the approaching train. The younger of the two stumbled and fell on the track. The elder lad, who had reached the other side, went back to rescue his brother, and succeeded in doing so, but was killed in the attempt. In the meantime Priglise, observing the danger of the boys, left his crossing and went to their assistance, and was himself struck and killed by the train. The question is: Did the accident to him arise out of his employment?

The findings of the commission seek to establish the inference that the northerly approach to these two highway crossings was guarded by the gateman of the New York Central Railroad Company, and that the southerly approach to both of them was guarded by the deceased employee of the appellant. No such inference is justified by the evidence. The arrangements of the two railroad companies for guarding the two crossings were as complete and independent of each other as if the crossings had been separated by a distance of miles. There was ample space between the two crossings for pedestrians or vehicles, after having crossed one railroad, to stop and await the passage of a train on the other, and as a matter of fact each of the two crossings was guarded on both sides

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by the two railroad companies, respectively, without reference to each other. The duties of Priglise were confined entirely to the crossing of the appellant. The uncontrad.cted evidence shows this to be the fact.

In Matter of Waters v. William J. Taylor Co., 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A, 347, and award was sustained where an employee engaged to save the life of another employee engaged in the same construction, but working for a different employer. The question in that case, as stated in the opinion, was whether the general employment of the deceased employee authorized his attempt to rescue from death a fellow laborer "working only a few feet away on the same general undertaking, although for a diferent employer." It was further stated that "his act was prompted by the relationship existing between himeslf and a fellow workman, caused by their employment on a common undertaking," and emphasis was laid on the fact that the fellow workman was only "technically working for a diferent employer." The opinion was carefully limited to the facts of the particular case. In Matter of Di Salvio v. Menihan Co., 225 N. Y. 128, 121 N. E. 766, the court, in reviewing a number of authorities in which it had been held that the accident arose out of the employment, alluded to the Waters Case, and said that perhaps it went farther than any of the others, and again called attention to the fact that the rescued workman was only technically in the employ of an independent contractor, and in explaining the decision said that between the work for which the employee was engaged and the disputed act which led to the accident there was a real relationship, which brought the accident within the range of employment.

It seems to me that to sustain the award in this case it is necessary to extend the doctrine of the Waters Case much beyond the limits there existing, and to go farther than any case to which our attention has been called. The link connecting the employment with the accident which existed in that case is missing here. There was no community of interest between the two railroad companies in respect to these two crossings. There was no co-operation on the part of either employer or employees. Certainly the act of the deceased employee was not within the contemplation of his employment, because the other railroad company employed a man to prevent the identical situation which led to the accident. It was the duty of the gateman of the New York Central Railroad to keep people off its tracks when a train was approaching. It could not have been contemplated or anticipated that an emergency would arise, authorizing Priglise to do that which it was the duty of the New York Central gateman to do, or which became necessary or proper because of his omission of duty. The accident occurred on different premises, and without any relationship connecting the accident with the employment. The act of Priglise was heroic, and elicits the highest commendation; but we must not permit our admiration for his heroism to blind us to the injustice of requiring his employer to pay for his heroism, no matter how meritorious, unless it was displayed in an act which properly can be said to have arisen out of and in the course of his employment.

I advise that the award be reversed, and the claim dismissed.

Woodward, Henry T. Kellogg, and Kiley, JJ., concur.

JOHN M. KELLOGG, P. J. (dissenting). The crossing was practically a double crossing over the same street. The New York Central road maintained gates; the defendant road put the claimant at its part of the crossing for the protection of people. When not upon the crossing, his station was near the property line of the companies. He had no other duty, except to protect the public at the crossing, and the situation was so complicated that, when he saw a little child about to be run down by a Central train, it was clearly within the line of his duty and the dictates of humanity to exercise his function as a life saver and save the child. If

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he had remained in his chair, and witnessed the death of the child when he apparently could have saved it, he would undoubtedly have lost his job. The claimant only did what his employer would have done, and, if the employer had observed the situation, it would have required the employee to go to the rescue. From the nature of the service, it was a fair condition of it that in an emergency like this the employee was to act as a human being, and that by such action he should not abdicate the employment. His actions were fairly incidental to his employment.

In Waters v. Taylor Co., 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A, 347, two contractors were working at their respective jobs on the same building, and when the employee of one contractor went to the relief of the employee of another contractor in another part of the building, it was held that he was well within the scope of his employment in doing the humane act. In that case neither contractor was engaged in a business peculiarly hazardous, and neither man was there for the purpose of protecting any one from harm, but was charged with the duty of doing his ordinary day's work. Here was practically a double crossing, each railroad having an employee to protect the public while using the same street The men were placed in a position calling for quick action in an emergency to save life. Any distinction drawn between the Waters Case and this case favors us.

I am for an affirmance.

RAINA v. STANDARD GASLIGHT CO. OF CITY OF NEW YORK.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement, 264.

MASTER AND SERVANT—COMPENSATION FOR INJURY TO EYESIGHT HELD WARRANTED.

An award of compensation for injury to the eyesight of an employee, who was burned in the course of his duties, *held*, under the evidence, warranted, though oculists testified that in their opinion the defective eyesight was from other causes, and that the rejected claimant's testimony because they had never seen similar case; there being testimony that for many years previous claimant was engaged in the building work and had no ocular defect.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from State Industrial Commission.

Claim by Felice Raina against the Standard Gaslight Company of the City of New York, employer, for compensation under the Workmen's Compensation Act (Consol. Laws, c. 67). From an award of the State Industrial Commission, the employer appeals. Award sustained.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Shearman & Sterling, of New York City, for appellant.

Charles D. Newton, Atty. Gen., and E. C. Aiken, Asst. Gen. (Bernard L. Shientag, of New York City, of counsel), for respondent State Industrial Commission.

Napoleon B. Kleinpeter, of New York City, for respondent Raina.

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KILEY, J. The appellant, employer, is a self-insurer, in New York City. The employer s first report, after a careful examination by its foreman or superintendent, says that on the 6th day of December, 1918, at 7:20 a. m., elaimant—

"was wheeling ashes in cellar, when Fireman F. Nettis opened, by mistake, ash clapper on No. 2 generator, which was on a gas-making run at the time. The escaping gas ignited, causing severe burns on face, and arms, and body."

It was explained in the evidence before the commission that in the one intended to be opened, for the purpose of removing slag and ashes, the gas had been turned off. Claimant was sent to a hospital, his burns treated, and compensation awarded on account of the burns to his head, face, and limbs, about which appellant finds no fault. Some time later claimant discovered that when he left his bed, after a confinement of five or six weeks, he could not see out of his left eye, and but little out of his right eye. The oculists, one for the respondent and one for the appellant, say that this condition existed for a long time and was due to causes, or which they know nothing, long predating the injury by the gas flame. Dr. Gulliver testified before the commission:

"I had him come to me on two different occasions, in hope that he would acknowledge more vision, or that I could prove he was an exaggerater or malingerer. I couldn't prove he was an exaggerater or malingerer, however, and whatever I say regarding that is my opinion. I have no definite proof."

Notwithstanding the position Dr. Gulliver takes on this case, he says, if the claimant came to him for treatment, not for evidence, he would assume his statements were true. He says the reason he does not accept them now is because he never has seen a case like it before—not a very convincing reason. There is practical agreement between the doctors that the vision of the left eye is useless. An engineer and contractor that claimant worked for him 18 years, on buildings, stagings, pipes, beams, and timbers, and that there was nothing defective in his eyesight that showed in his work in all of these dangerous places. He worked for the appellant a couple of years; coworkers said his eyesight was bad, but none could tell any instance where he manifested it by acts or words. All right before the fire; helpless ever after; is there any other cause? The commissioin awarded him 128 weeks' compensation because of this injury, and appellant cites Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540, Collins v. Brooklyn Union Gas Co., 171 App. Div. 381, 156 N. Y. Supp. 957, Potts v. Pardee, 220 N. Y. 433, 116 N. E. 78, Boscarina v. Carfaguo & Dragonette, 220 N. Y. 323, 115 N. E. 710, Ann. Cas. 1918A, 530, Frings v. Pierce-Arrow Motor Car Co., 182 App. Div. 445, 169 N. Y. Supp. 309, and Grammici v. Zinn, 219 N. Y. 322, 114 N. E. 397, as sustaining its connection. An examination of each and all of these cases shows they are easily distinguishable from the one at bar. I am inclined to think that the able prevailing opinion in Weber v. Haiss Mfg. Co., 191 App. Div. 12, 181 N. Y. Supp. 140, affirmed in the Court of Appeals without opinion, points the way to the real solution of claimant's difficulty.

The award should be sustained. All concur.

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SKOUITCHI v. CHIC CLOAK & SUIT CO., INC., ET AL.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement, 321.

MASTER AND SERVANT — PRESIDENT AND MANAGER OF CORPORATION HELD NOT WITHIN THE COMPENSATION ACT.

The president and treasurer of a corporation, who with his father managed and directed its business, and who received a salary, which was included in the pay roll, and on which premium was paid to insurer, was not entitled to compensation for injuries under Workmen's Compensation Act, § 54, subd. 6, as added by Laws 1916, c. 622, where there was no separate statement added to pay roll estimating the wage value of the labor incidental to his occupation, as distinguishable from his salary as an officer.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

John M. Kellogg, P. J., and Kiley, J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Irving Skouitchi for compensation for injuries, opposed by the Chic Cloak & Suit Company, Incorporated, employer, and the General Accident, Fire & Life Assurance Corporation, Limited, insurer. Award for claimant by the State Industrial Commission, and the employer and insurer appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Alfred W. Meldon, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The employer is a corporation of which the claimant is its president and treasurer. The question here presented is whether he is also an employee, within the meaning of the Workmen's Compensation Law (Consol. Laws, c. 67), so as to be entitled to an award for injuries received in the performance of his duty.

Subdivision 6 of section 54 of the act (as added by Laws 1916, c. 622) gives to injured employers performing labor incidental to their occupations the same rights and remedies as are given employees:

"Provided. however, that the estimation of their wage values, respectively, shall be reasonable and separately stated in and added to the valuation of their pay rolls upon which their premium is computed."

This statute contemplates insurance of employers, not in their occupations as such employers, but for "labor incidental" to such occupations. For employers to receive the benefit of the statute it is required, first, that there shall be a reasonable "estimation of their wage values," as distinguishable from their salaries or compensation as such employers, or as officers thereof, in case the employers are corporations; second, such reasonable estimation shall be "separately stated" in the pay rolls; and, third, it shall be "added to the valuation" of the pay rolls. The purpose of these requirements is that there shall be a joint contemplation by both the insurer and the insured that accidents to

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the employer are included in the risk. Matter of Hubbs v. Addison Electric Light & Power Co., 191 App. Div. 765, 182 N. Y. Supp. 152, in explaining Matter of Sharlow v. Sharlow Bros. Co., 181 App. Div. 963, 168 N. Y. Supp. 1130.

By an examination of the pay roll it is intended that the insurer shall be made aware of its liability and the extent thereof. The employer in such a case is insured, not as the proprietor of the business, but for the performance of labor incidental to such proprietorship, and to that extent is placed on the same basis as his employees and is insured accordingly for such incidental labor. In the present case it appears that the salary of the claimant was included in the pay roll which was audited by the insurer and that a premium was paid to the insurer on such salary. But it does not appear that there was any estimation of the "labor incidental" to the claimant's occupation, as distinguished from his salary as an officer of the corporation, nor does it appear that such estimation was "reasonable and separately stated in and added to the valuation of" the pay roll. There has been no compliance with the statute in the particulars indicated, and the claimant is not entitled to its benefits.

In Matter of Berman v. Reliance Metal Spinning & Stamping Co., 187 App. Div. 816, 175 N. Y. Supp. 838, it was held by a closely divided court that the claimant, although treasurer of the corporation was entitled to an award. But that case is clearly distinguishable from the present case. The theory of the award was that the claimant was "a high-priced laborer, the superintendent of the plant." The corporation in the present case has a capital of only $1,200, consisting of 120 shares, of $10 each. The claimant owns 10 shares, and the other stockholders are his father and two brothers. No dividends have ever been paid. The claimant and his father are the active members of the corporation; the two brothers taking no part in the management thereof. The claimant drew $25 a week and his father $15; $40 a week was paid to the claimant's mother, apparently for housekeeping expenses, the claimant and his father and one of the brothers constituting the household. The business was essentially a family arrangement. The work done was making women's apparel. There were from 5 to 15 employees. Claimant and his father co-operated in the management and direction of the business. The claimant performed such work as might have been done by an employee, and was so engaged when he received the injury in question, caused by a splinter piercing his right thumb, resulting in the partial loss of the use thereof. An employer, however, does not become an employee merely because he performs work ordinarily performed by employees. In the Berman Case it was said:

"It is not the fact that a man is a stockholder and officer of the corporation that determines; it is the character of his employment."

It may also be pertinently said that, independently of the statute, it is not the work which he is doing when he received the injury, but the capacity in which at the time he is acting and his relation to the business, which determines. The question is whether he was in fact an employee, or an employer doing work which might have been done by an employee. That question must be determined from all the circumstances. Here claimant had no superior. He was not only the actual head of the corporation, but he and his father were in fact at the actual head of the business. In answer to a question as to whether he took orders from his father, or gave orders to his father, he answered, "Both work hand in hand." If the business had not been incorporated, it would be essentially a partnership, with the claimant as one of the partners. He testified that his father was "just an interested partner"; that the claimant himself was not an employee, but that he was his "own employer"; and that the only way to get rid of him was to dissolve the partnership. This testimony is not merely the mistaken inference of the claimant, but correctly expresses his actual relationship to the business. He was ac-

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countable to no one in the performance of his duties. The distinction between this case and the Berman Case is apparent.

Attention is called to the cases of Matter of Bowne v. S. W. Bowne Co., 221 N. Y. 28, 116 N. E. 364; Matter of Howard v. Howard, 9 State Department Reports, 355, reversed 221 N. Y. 605, 117 N. E. 1072; Matter of Kennedy v. Kennedy Manufacturing & Engineering Co., 177 App. Div. 56, 163 N. Y. Supp. 944, reversed on reargument 182 App. Div. 907, 168 N. Y. Supp. 1114. In those cases awards were denied because the claimants were performing corporate duties, rather than the duties of employees. The principles determined in those cases are controlling in this. The mere fact that the claimant was president and treasurer of his corporation is perhaps not very important in this case. The important feature is that in his relation to the business he was in no sense an employee, but had all the attributes, powers and functions of an employer.

The Legislature having provided a method whereby "employers who perform labor incidental to their occupations" may be insured for such incidental labor, no just criticism can be made by an employer who fails to avail himself of the method thus provided

The award should be reversed, and the claim dismissed. All concur, except.

KILEY, J. (dissenting). The question, that claimant was not engaged in hazardous employyment, as defined by the Workmen's Compensation Law, when he received his injury, is not raised upon this appeal. Claimant testified that in getting a basis for the amount of premium the Chic Coat & Suit Company, Incorporated, for which he worked, should pay his wages and the wages of his father were figured in the pay roll and the premium was paid accordingly. The accident occurred January 15, 1919, and the force of Bowne v. Bowne, 221 N. Y. 28, 116 N. E. 364, the sole authority relied upon by appellant, was destroyed by the amendment to section 54 of the Workmen's Compensation Law, by chapter 622 of the Laws of 1916, by adding subdivision 6, which reads as follows:

"Any insurance carrier may issue policies, including, with the employees, employers who perform labor incidental to their occupations, such policies insuring to such employers the same compensations provided for their employees, and at the same rates: Provided, however, that the estimation of their wage values, respectively, shall be reasonable and separately stated in and added to the valuation of their pay rolls upon which their premium is computed. The employer so insured shall have the same rights and remedies given an employee by this chapter."

The claimant having testified that his wages were included in the pay roll, which pay roll at the beginning of the term of insurance is a process of estimation always, it will be presumed that the insurer employed such method of figuring as complied with the subdivision, and gave to this corporation an enforceable policy; that the appellant insurance carrier did not commit a fraud in accepting its money at the time, knowing or believing it could escape liability in the event a claim was made under the policy it was then issuing. The burden of proof shifted with that evidence of the claimant; he presented his policy to the commission. The carrier could have put it in evidence, and thus demonstrate that the claim was unfounded; or it could have produced its records and could have shown that a different basis than the one contended for by claimant was had. It was not done; the insurance carrier having the evidence in its possession, under its control, the failure to produce it should not raise a presumption against the claimant; the reverse should be presumed.

Matter of Hubbs v. Addison Electric Light & Power Co., — App. Div. —, 182 N. Y. Supp. 152, decided at May term, 1920, purposed to

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show, and did show, that cases following the rule laid down in Bowne v. Bowne, supra, after the addition to section 54 of subdivision 6, were not in accord with the statute as so amended. That this is a small corporation, and that its stockholders and officers go forth from the same paternal roof, does not change its character as a legal entity, entitled to the protection of insurance under the Workmen's Compensation Law, if it seeks to avail itself of that privilege and consequential benefit. The distinction between the rule held here and the Hubbs Case, supra, impresses me as extremely technical. Any benefit that might flow from the application of the rule suggested in the opinion for reversal, in favor of appellant, was lost when it failed to meet the burden of proof cast upon it by claimant's evidence.

I favor affirmance.

JOHN M. KELLOGG, P. J. (dissenting). This was a family corporation, with $1,200 in stock, consisting of 120 shares, of $10 each, of which the claimant owned 10 shares, one-twelfth of the corporation. The other brothers owned 70 per cent. of the stock and the father the balance. The claimant was paid $25 a week for his work, the father $15; $50 a week was paid to the mother as representing the capital which the other brothers had in the business. The corporation never paid any dividends, and employed from 5 to 12 people in the business. The claimant was president and treasurer, but the father, as manager, signed all the checks and vouchers, and the claimant, as president, did nothing except to preside at the stockholders' meetings. His services as president were merely nominal. He was treasurer only in name. He was the general all-around man, as he says, working on books, shipping, checking out packages, doing most everything; shipped and cleaned garments, examined garments and things of that kind. He also took orders, but did not work any in manufacturing. The manager and bookkeeper had the control of the cash income and outgo.

This case is not in the same class with Bowne v. Bowne, 221 N. Y. 28, 116 N. E. 364. There the injured employee had received in stock dividends $30,000 in the preceding year. The Court of Appeals says:

"Practically he was the corporation and only by a legal fiction its servant in any sense."

He was denied compensation upon the ground that he was really the employer. It was not just to apply the broad principle of that case, where the stockholder was really the company and the company was engaged in large affairs, to this little corporation, in which the claimant owned but a 10 per cent. interest, and never received, and perhaps never will receive, a dividend. His only substantial interest in the corporation was his wages, $35 a week, and he is well within Berman v. Reliance Metal Spinning & Stamping Co., 187 App. Div. 816, 175 N. Y. Supp. 838. Here the other brothers practically own the corporation, and permitted it to be carried on for the benefit of the family. The claimant was injured while performing the general work for which he was paid.

The insurance company audited the pay rolls upon which the premium on the policy was fixed, and included in the audit the salary of the claimant and his father. Both parties intended that the father and claimant should be covered by the policy, and it is fairly within the spirit of subdivision 6 of section 54. Matter of Hubbs v. Addison Electric Light & Power Co., 191 App. Div. 765, 182 N. Y. Supp. 152, decided at the May, 1920, term. The proviso added to that subdivision, "that the estimation of their wage values, respectively, shall be reasonable and separately stated in and added to the valuation of their pay rolls upon which their premium is computed," has no force here, from the fact that the only real service the claimant performed for the corpora-

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tion was as an employee, and there was therefore no division of his salary, because the wages received only represented work outside of his office as president and treasurer. Manifestly he received no compensation from the fact that he was named president and treasurer. The wages received by him were only fair compensation for an ordinary employee. The record conclusively shows that the minds of the insurer and the insured contemplated the protection of the claimant as an employee. We cannot review the conclusion of fact that the claimant was an employee, and was insured as such.

I favor an affirmance.

PRDICH v. NEW YORK CENT. R. CO.

(New York Supreme Court, Trial Term, New York County. April, 1920.)

183 New York Supplement 77.

2. MASTER AND SERVANT—COMPENSATION ACT OF SISTER STATE HELD APPLICABLE.

Where, in an action for an employee's death, caused by negligence, it appears that the death occurred and all the services were rendered in another state, where the contract of employment was made and to be performed, the exclusive remedy of the next of kin is under the Workmen's Compensation Act of that state, so that no action can be maintained by his administrator in this state.

(For other cases, see Master and Servant, Dec. Dig. § 368.)

Action by John Prdich against the New York Central Railroad Company for wrongful death. Verdict for plaintiff set aside, and complaint dismissed.

Izrael H. Zinovoy, of New York City, for plaintiff.
A. S. Lyman, of New York City, for defendant.

PENDELTON, J. The action is by an andministrator to recover damages for death caused by negligence of an employee of defendant railroad company. Motions to dismiss at the end of plaintiff's case and on all the evidence, and after verdict to set the verdict aside, were made, and decision reserved.

[1] The death occurred and all the services were rendered in New Jersey. Defendant contends that under either the New York Workmen's Compensation Law (Consol. Laws, c. 67) or the New Jersey Workmen's Comepnsation Law (Comp. St. Supp. 1911-1915, p. 1638) the remedy is exclusive, and that therefore plaintiff cannot maintain this action. Where all the service is rendered in another state, and no service is contemplated here, the New York Workmen's Compensation Act does not apply. Gardener v. Horseheads Construction Co., 171 App. Div. 66, 156 N. Y. Supp. 899, approved Matter of Smith v. Heine Boiler Co., 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D, 316. In cases such as this, to recover for the benefit of the next of kin damages for death caused by negligence in another state, the action is based on the right given by the statutes of the place of the death, in this case New Jersey. Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198.

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[2] The New Jersey statute, like the New York statue in that respect, gives a right of action for the benefit of the next of kin where the employee, if injured only, would have been entitled to maintain an action for damages. The New Jersey Workmen's Compensation Act is applicable and exclusive, where the parties have by agreement, express or implied, accepted its terms, and expressly provides that every contract of hiring shall be presumed to have been made with reference to its terms, unless there be an express statatement in writing as part of the contract or by written notice to the contrary. The contract of employment was made and performed in New Jersey, and there being no written disclaimer under the law of New Jersey, the contract was within the Workmen's Compensation Act of that state which is exclusive. On both grounds this action cannot be maintained. Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 92 Atl. 354.

Verdict set aside and complaint dismissed.

Judgment accordingly.

KNORR v. CENTRAL RAILROAD OF NEW JERSEY.

(Supreme Court of Pennsylvania. June 26, 1920.)

110 Atlantic Reporter 797.

3. MASTER AND SERVANT—RAILROAD MUST SHOW CASE IS CONTROLLED BY FEDERAL ACT.

Where it appears that a railroad's servant was injured in the course of his employment, the burden is on the railroad to show the case is controlled by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), making negligence the test of liability.

For other cases, see Master and Servant, Dec. Dig. § 403.)

Appeal from Court of Common Pleas, Luzerne County; S. J. Strauss, Judge.

Proceeding under the Workmen's Compensation Act for compensation for the death of Wheeler Knorr, the employee, by Edna May Knorr, opposed by the Central Railroad of New Jersey, the employer. Compensation was denied by the Industrial Board, the denial reversed by the court of common pleas, and the employer appeals. Judgment of the court of common pleas affirmed.

Argued before Brown, C. J., and Moschzisker, Frazer, Walling, Simpson, and Kephart, JJ.

Jacob C. Loose, of Mauch Chunk, for appellant.
Roger J. Dever, of Wilkes-Barre, for appellee.

KEPHART, J. Wheeler Knorr was employed by the Central Railroad of New Jersey as an extra fireman. He lived at Mountain Top, in Luzerne County; his work commencing at Ashley, 16 miles distant. The company furnished him a system pass over its railroad and a plain train (an independent operation of the company) to ride to and from his work. On November 12, he was called to assist in taking a train from Ashley to Taylor, returning the same day with a train made up partly of cars

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shipped from points outside the state, and thus he was engaged in interstate commerce. Upon arriving at Ashley, decedent, with other members of the crew registered and checked out, the day's working having been ended. After attending to some personal business in the town, Knorr proceeded by way of the plain train to reach his home, and while riding in a car on this train was accidentally killed, being struck on the head by an overhead bridge. A claim was made by his widow for compensation, which was allowed by the referee. On appeal to the board, by agreement, the same evidence taken before the referee was used, and it was found "that the employer and employee were at the time of the accident both engaged in interstate commerce * * * and * * * this board has no jurisdiction." This conclusion of law was reversed by the court below, and the employer takes appeal, urging that deceased was not killed in the course of employment, or, if so, he was engaged in interstate commerce when injured, and appellant would not be liable under the Compensation Act.

[1] In accepting and using free transportation to and from work, Knorr was not to be regarded as a passenger, but as an employee, in this case under general employment. it began when he boarded the train at Mountain Top, and continued until he entered the particular premises, where he was to perform the special work designated by the employer. The service from the place of residence to the place of work, using the facilities furnished by the company, was useful to the company; and the place of residence, while a matter of convenience to him, was nevertheless beneficial to the employer, being within easy reach of his place of work, and appellant would require it to be so. His transportation may be regarded as a privilege incidental to the contract of service, if it is not a part of his compensation. Vick v. N. Y. etc., R. R. Co., 95 N. Y. 267, 271, 47 Am. Rep. 36; Tex. & Pac. Ry. Co. v. Smith, 67 Fed. 524, 526, 14 C. C. A. 509, 31 L. R. A. 321; Ionnone v. N. Y., etc., R. R. Co., 21 R. I. 452, 454, 44 Atl. 592, 46L. R. A. 730, 79 Am. St. Rep. 812. The pass was therefore beneficial to both employer and employee. and when his labors were over the mere fact that he stopped for a short period to transact business in the town would not break the continuity of his general employment, which arose after his special labor had ceased, when he had registered, checked out, and left the premises to go to a railroad independent, disconnected, and separated from the line upon which he was working. True, while off the premises of his journey to the plain train, or in the town, his employment was suspended; but it was immediately resumed when he boarded the plain train. This break in the chain of events only emphasizes the assertion he was injured while engaged in interstate commerce. On the road that he worked he had no regular run engaged in such commerce, nor was he assigned in order "first in, first out," but was called for specific or special services occasioned by the absence of the regular man. He learned the character of this work when he reached Ashley. Had he been injured after he checked out, and was in the act of leaving the yard, or the premises of the appellant, where he had been working, the character of the employment that he had just left would follow him as a necessary incident of his day's work and partook of the character of that work as a whole, which was both interstate and intrastate. His employment would have been in both, but as related to the company 's liability it would be held to be interstate work, for which appellant would not be liable. Erie R. R. Co. v. Winfield, 244 U. S. 170, 173 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. But the interstate relation ceased when he left the premises, and under the terms of his general employment, exercising a privilege incidental to that employment, boarded the plane train at Ashley, and, still continuing in the general employment, received the injury that caused death.

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[2, 3] At that time he was not engaged in interstate commerce. To relieve appellant from the obligation of the act, where it appears an injury was received in the course of employment, the burden is on the employer to show the facts are controlled by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), which makes negligence the test of liability.

"And the true rule apparently is that to come within the range of interstate commerce the work must bear directly, and not remotely thereon, * * * and the burden is on defendant, who interposes the federal statute, to prove facts necessary to bring the case within the terms." Di Donato v. P. & R. Ry. Co., 266 Pa. 412, 109 Atl. 627; Reynolds v. P. & R. Ry. Co., 109 Atl. 660, not yet [officially] reported.

[4] The character of the commerce the employee was engaged in is to be determined by the work he was actually doing when injured. Hench v. Penna. R. R. Co., 246 Pa. 1, 9, 91 Atl. 1056, L. R. A. 1915D, 557, Ann. Cas. 1916D, 230; Ill. Central Railroad Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Chicago v. Harrington, 241 U. S. 177, 180, 36 Sup. Ct. 517, 60 L. Ed. 941. This case bears strong resemblance to Minneapolis, etc., R. R. Co. v. Winters, 242 U. S. 353, 356, 357, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, and is clearly distinguishable from N. C. R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Erie R. R. Co. v. Winfield, supra, and St. Louis, etc., R. R. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156.

The judgment is affirmed.

KUCA v. LEHIGH VALLEY COAL CO.

(Supreme Court of Pennsylvania. June 26, 1920.)

110 Atlantic Reporter 731.

1. MASTER AND SERVANT—REVISORY POWERS OF SUPREME COURT UNDER COMPENSATION ACT DEFINED.

The revisory powers of the Supreme Court, under the Compensation Act of 1915, as amended in 1919 (P. L. p. 642), are limited to such consideration of the record as will enable the court to ascertain whether there is evidence to support the findings of the Compensation Board, and if on such findings the law has been properly applied.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

2. MASTER AND SERVANT — PRACTICE ON REVIEW OF AWARD OF COMPENSATION.

Under the Compensation Act of 1915 as amended by Act June 26, 1919 (P. L. 665) art. 4, § 427, when the common pleas sustains exception to an award of the Compensation Board and reverses its action, it must remit the record for further hearing, when, if further evidence produced is merely cumulative, it is the duty of board to disallow the claim.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

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3. MASTER AND SERVANT—AMENDMENT OF COMPENSATION ACT AFFECTING PROCEDURE HELD APPLICABLE TO PENDING ACTIONS.

Act June 26, 1919 (P. L. 642), amending the Compensation Act of 1915, *held* to apply to an action already instituted, since it affects only procedure, and does not disturb vested rights, or impair contract obligations.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

6. MASTER AND SERVANT — INJURY TO MINE EMPLOEE GOING INTO ABANDONED OPENING HELD NOT IN COURSE OF EMPLOYMENT WITHIN COMPENSATION ACT.

Where a mine employee left his regular working place and went to another section of the mine, and with a companion went into a old abandoned opening for some 70 feet, where no duty or business called him, being 500 feet distant from his proper working place, and there caused an explosion of gas, his death was not in the course of his employment within the Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Appeal from Court of Common Pleas, Luzerne County; J. B. Woodward, Judge.

Proceedings for compensation under the Compensation Act for the death of Joseph Kuca, the employee, by Kinegunda Kuca, opposed by the Lehigh Valley Coal Company, the employer. Compensation was awarded, the award reversed by the Court of Common Pleas, and claimant appeals. Judgment of the court of common pleas modified to read that the award of the Compensation Board is reversed, and the record remitted to it for further hearing and determination.

Argued before Brown, C. J., and Frazer, Walling, Simpson, and Kephart, JJ.

Roger J. Dever, of Wilkes-Barre, for appellant.
P. F. O'Neil and F. W. Wheaton, both of Wilkes-Barre, for appellee.

KEPHART, J. The appeal to the court below from the award of the Compensation Board was subsequent to the 1919 amendment (P. L. 642) of the Compensation Act of 1915 (P. L. 736). Prior to the amendment, the findings of the referee and the board as to matters of fact were generally conclusive, as no provision had been made to bring up the testimony as part of the record. The appeal was in the nature of a certiorari, adopted to prevent appeals to the courts except for errors of law, and so hasten final determination of claims under the act. The judicial review was limited to an inspection of the record to ascertain whether the judgment was in conformity to law, and the opinion of the court was considered part of the record, and the findings as contained in the record of the referee and board could be examined in deciding the question of law before the court. McCauley v. Imperial Woolen Mills Co., 261 Pa. 312, 321, 322, 104 Atl. 617. The amending act of 1919, by article 4, § 427, in addition to the other changes therein mentioned, requires the board to "certify to such court its entire record in the matter in which the appeal has been taken, including the notes of testimony, * * * when an appeal is taken to the common pleas, or to this court, and it is upon this record the appeal is determined.

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[1] It was not intended by the Legislature that this court should be an appellate administrative tribunal to weigh the evidence submitted to the referee or the board. Our revisory powers are limited to such consideration of the record as will enable us to ascertain whether there is evidence to support the findings of the board, and if upon such findings the law has been properly applied. Though we may be of opinion, from the apparent weight of the evidence, that a finding should be made adverse to that of the board, we are not at liberty to enter or direct such different finding, where the one adopted by the board is supported by proof. The Legislature has confided to the Compensation Board and referees the exclusive function of determining what facts are established. Our investigation is therefore limited to the question of law raised by the record, and is somewhat analogous to our review in an appeal from confirmation of an auditor's report, or decree in equity.

[2] When the common pleas sustains an exception to an award and reverses the action of the board, it must remit the record to the board for further hearing and determination. Article 4, § 427, Act June 26, 1919 (P. L. 642). In furtherance of its humane purpose, the act gives claimant every opportunity to produce evidence to sustain her claim, and in directing that the report be returned to the Compensation Board for further hearing, opportunity is presented to produce such additional evidence. It was not intended that such hearings should continue indefinitely, and, if the new evidence is merely cumulative, it is the duty of the board to disallow the claim.

[3-5] It is contended the amending act of 1919 does not apply to an action already instituted. We cannot agree to this. The section in question affects the procedure; it does not disturb vested rights, or impair contract obligations. Procedure is a matter of statutory regulation, and, unless prevented by the Constitution, the Legislature may alter it at will, provided the obligations of contracts are not impaired. but where the remedy is not entirely taken away, and the scope of the powers or duties of the hearing tribunals are merely enlarged, no contract is impaired. Legislation which affects rights will not be construed to be retroactive unless it is declared to in the act. But, where it concerns merely the mode of procedure, it is applied, as of course, to litigation existing at the time of its passage. Kille v. Reading Iron Works, 134 Pa. 225, 227, 19 Atl. 547; Lane v. White, 140 Pa. 99, 101, 21 Atl. 437; Laukhuff's Estate, 39 Pa. Super. Ct. 117, 119; Long's Appeal, 87 Pa. 114.

In this case it was contended at the hearing that decedent met death in the course of employment by an explosion of gas in the mine of defendant. The referee disallowed the claim, making specific findings of fact in relation thereto. Claimant appealed to the Compensation Board, a hearing de novo was granted, and the testimony offered before the parties, accepted by the board. It held death resulted in the course of employment and awarded compensation. Upon appeal the common pleas reversed the board, and sustained the referee.

[6] After a careful review of the evidence, we are convinced the following finding was the only one that could be made from the evidence: On May 31, 1918, Joseph Kuca left his regular working place, on road 203, went to another section of the mine, namely, road No. 242, along which he traveled for some distance until he came to an old abandoned opening, which had been driven to a depth of 120 feet off the last-mentioned road. He and a companion went into this old abandoned opening a distance of about 70 feet, and there caused an explosion of gas. No duty or business called him to the scene of the accident, which was 500 feet distant from his proper working place. When he met death he was not engaged in the furtherance of the business or affaires of his employer, and nothing in the nature of his employment required his presence within 500 feet of the scene of the accident or in the section of the mine where the accident occurred.

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The judgment of the court below is modified to read that the award of the Workmen's Compensation Board is reversed, and the record is remitted to the board for further hearing and determination as prescribed by law; costs to be paid by appellee.

WILSON v. H. C. FRICK COKE CO.

(Supreme Court of Pennsylvania. June 26, 1920.)

110 Atlantic Reporter 723.

MASTER AND SERVANT—INJURY WITHIN COMPENSATION ACT HELD NOT TO INCLUDE DROWNING WHILE GOING FOR PHYSICAL EXAMINATION ORDERED; "COURSE OF EMPLOYMENT."

Where a day laborer, who was ordered to appear before the company's physician for physical examination after working hours on a certain evening, did not appear at the designated time and place, but voluntarily appeared the next evening at another town, and was drowned on returning across a river, his death was not due to an accident in the course of his employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Court of Common Pleas, Fayette County; J. Q. Van Swearingen, President Judge.

Proceeding by Lucy Wilson under the Workmen's Compensation Act (P. L. 1915, p. 736) to obtain compensation for the death of her husband, opposed by the H. C. Frick Coke Company. Compensation was denied applicant, and she appeals. Appeal dismissed.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, Walling, Simpson, and Kephart, JJ.

A. E. Jones and J. C. Glassburn, both of Uniontown, for appellant.
W. J. Strugis, of Uniontown, for appellee.

PER CURIAM. The husband of the appellant, an employee of the H. C. Frick Coke Company, was drowned in the Monongahela river on the night of December 21, 1917, by stepping from the ice on it into a current exposed by a boat cutting its way through the ice. He was returning from the office of the company's physician, to whom he had been directed to go the day before by his foreman, for the purpose of physical examination. A specific finding of the referee, affirmed by the Compensation Board, is:

"The deceased while returning from Masontown where he had undergone a physical examination at the request of the defendant company was not in the course of his employment, and therefore his death was not due to an injury by accident while in the course of his employment with the defendant company."

On appeal to the court below the action of the board was sustained, and th s appeal is dismissed on the following from its opinion affirming said action:

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"In the present case the deceased was but an ordinary day-laborer, with fixed working hours, without the limits of which his employer was not privileged to call upon him for his services without additional compensation. He had been ordered by his foreman to appear before the company's physician at Ronco for a physical examination on the evening of December 20, 1917. He did not appear at that time and place, but voluntarily appeared at the home of the physician at Masontown the next evening, thus determining for himself when and where he would submit himself for examination. He was not being paid for the time he consumed undergoing the examination or in going to and from the place of examination. He was not injured while performing any duty which he was employed to perform, nor while actually engaged in the furtherance of the business or affairs of his employer'.

Appeal dismissed.

DILLON v. MARK et al. (No. 5283.)

(Supreme Court of Rhode Island. June 30, 1920. On motion for Reargument July 9, 1920.)

110 Atlantic Reporter 611.

1. MASTER AND SERVANT—COMPENSATION INSURER HELD LIABLE FOR INJURIES TO ONE NOT SERVANT.

A pedestrian injured by falling over building materials placed on a highway may hold an insurance company which has issued to the contractor a policy of insurance against liability for personal injuries subject to the provisions of Pub. Laws 1915, c. 1268, § 9, liable for the damages, although the only negligence alleged is that of the contractor, and no service of the writ is made upon the contractor. such statute relating to personal injuries other than those sustained by an employee.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, President Justice.

Action by Mary Dillon against F. W. Mark and the Employers' Liability Assurance Corporation, Limited. There was a ruling dismissing the action, and plaintiff brings exceptions. Exceptions sustained, and case remitted for further proceedings.

Comstock & Canning and Edward M. Brennan, all of Providence, for plaintiff.

Gardner, Moss & Haslam, of Providence for Employers' Liability Assur. Corporation, Limited.

STEARNS, J. This is an action of trespass on the case for negligence brought by Mary Dillon, of Providence, against F. W. Mark, a general contractor residing in the state of Massachusetts, and the Employers' Liability Assurance Corporation, Limited, a foreign corporation doing business in said city of Providence. In her declaration plaintiff alleges that she sustained personal injuries while walking on a certain public highway in the city of Providence, which were caused by her falling over a pile of building material negligently placed and maintained by said Mark on the sidewalk and roadway of said highway; that defendant in-

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surance company had issued prior to the accident to Mark its policy of insurance, "subject to the provisions of section 9 of chapter 1268 of the Public Laws of the state of Rhode Island passed at the January session of the General Assembly of 1915, insuring said Mark against liability for personal injuries, which said policy was in full force and effect upon the day and year aforesaid [the day of the accident] and covered any claim for personal injuries received by persons using said highway during the period within which said Mark was engaged in said building operations."

Plaintiff joins the insurance company as a party defendant with said Mark under said statute (chapter 1268, § 9), and claims the right to recover judgment in this suit against either or both the insured and the insurer.

Service was made upon the corporation defendant by serving the insurance commissioner for the state of Rhode Island the officer appointed by law to accept service for foreign insurance companies doing business in this state, and an attested copy of the writ was mailed to the defendant Mark. The corporation defendant entered its appearance in the superior court, wherein said action was instituted, for the purpose of filing its motion to dismiss the action brought against it on three grounds; the third ground being that the said Employers' Liability Assurance Corporation, Limited, is not a proper party defendant in the action. Upon the hearing in the superior court the motion of the insurance company was denied on two of the grounds stated in said motion, and on the above-mentioned ground was granted. The plaintiff excepted to the ruling of the superior court dismissing the action, and duly prosecuted her bill of exceptions to the court.

The sole question before this court is as to the construction to be placed on the language contained in article 5 of chapter 1268, with particular reference to the language in section 9 thereof.

[1] The plaintiff claims the insurance company is a proper party defendant, and can be held for damages for the alleged personal injuries, although the only negligence alleged that of the defendant Mark, and no service of the writ in this case has been made upon him.

The defendant claims that section 9 should be construed as relating only to personal injuries sustained by employees who, though not entitled to compensation for such injuries, are entitled to relief under certain "alternative schemes" referred to in article 5 of the Workmen's Compensation Act.

Chapter 1268 of the Public Laws is entitled:

"An act in amendment of and in addition to chapter 831 of the Public Laws, passed at the January session, A. D. 1912, entitled 'An act relative to payments to employee for personal injuries received in the course of their employment, and to the prevention of such injuries.'"

Article 5 is entitled, "Insurance Against Liability to Pay Compensation."

The first eight sections of article 5 are provisions regulating the methods by which the employer who has selected to become subject to the provisions of the Workmen's Compensation Act shall secure the payment of compensation to an employee who has been injured by any accident. The form of policy of insurance which may be issued is prescribed, and it is further provided that jurisdiction of the employer for the purpose of the act shall be jurisdiction of the insurer, who shall be bound by all orders, decrees, and judgments rendered against the employer for the payment of compensation under the act, also every policy must contain an agreement by the insurer that the insurer shall be directly and primarily liable to the employee, or, in the event of his death, to his dependents, to pay the compensation for which the employer is liable; that every contract for the insurance of compensation shall be deemed to be made subject to the provisions of the act, and all provisions of such policies inconsistent with the act shall be void.

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We come now to section 9, which is as follows:

"Sec. 9. Every policy hereafter written insuring against liability for personal injuries, other than payment of compensation under this act, shall contain provisions to the effect that the insurer shall be directly liable to the injured party, and, in the event of his death, to the party entitled to sue therefor, to pay him the amount of damages for which such insured is liable. Such injured party, or, in the event of his death, the party entitled to sue therefor, in his suit against the insured, may join the insurer as a defendant, in which case judgment shall bind either or both the insured and the insurer; or said injured party, or, in the event of his death, the party entitled to sue therefor, after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against said insurer: Provided, however, that payment in whole or in part of such liability by either the insured or the insurer shall, to the extent thereof, be a bar to recovery against the other of the amount so paid: And provided, further, that in no case shall the insurer be liable for damages beyond the amount of the face of the policy.

"All policies made for the insurance against liability described in this section shall be deemed to be made subject to the provisions hereof, and all provisions of such policies inconsistent herewith shall be void."

The defendant in its brief claims, athough the language of section 9 is general, and a literal interpretation thereof would include all cases of liability for personal injuries at common law or under any statute other than liability for compensation, that there is doubt as to the scope of the general language used, and that consequently the court should take into consideration the title of the act; that, as the act deals with workmen's compensation, section 9 should be restricted to such compensation, because said section is inconsistent with the title and preamable of the act. We find no merit in this contention.

[2] The language used is plain and unambiguous, the intention of the Legislature is manifest therein, and there is no occasion to restort to the title of the act or any other sources to discover either the meaning or the intent of the statute. Having provided for the rights of an employee as against the employer and insurer, provision is then made by section 9 for the protection of persons who sustain personal injuries for which those who are liable have insured themselves against liability. No distinction is made in the act between domestic and foreign insurance companies; both, if they choose to do business in this state, must conform to the law, and are only authorized to issue policies in accordance with the law and subject to the provisions thereof.

In the case at bar, by the allegations in the declaration, the following facts appear: A foreign insurance company doing business in this state has issued its policy of insurance subject to the provision of section 9. The plaintiff is a resident of the state, the cause of action originated in this state, and process has been lawfully served on said insurance company. In our opinion, the defendant corporation is a proper party defendant in this action. The injured party may bring suit against the insurer directly or he may proceed, as was attempted to be done in this case, against both the alleged wrongdoer, the insured, and the insurer in one action. If he fails to secure service on one of the parties, he may proceed against the party upon whom service has been made.

The action of the superior court in dismissing the action against the defendant corporation was erroneous. The exception thereto is sustained, and the case is remitted to the superior court for further proceedings.

On Motion for Reargument.

PER CURIAM. After the opinion of this court was filed on June 30, 1920, the defendant the Employers' Liability Assurance Corporation,

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Limited, filed a motion for reargument by leave of court. This motion does not suggest any matter which was not fully considered and passed upon by the court before delivering its opinion.

The motion for reargument is denied and dismissed.

McHUGH v. WILLIAMS & PAYTON. (No. 5314.)

(Supreme Court of Rhode Island. July 7, 1920.)

110 Atlantic Reporter, 607.

1. MASTER AND SERVANT—PAYMENT OF COMPENSATION FOR INJURY MUST BE SPECIALLY PLEADED.

In an employee's personal injury action against a third person, the defense that plaintiff had been paid compensation by the employer, under Workmen's Compensation Act, art. 1, § 7, must be specially pleaded, and it is not error to exclude evidence of such payments where the only plea filed is the general issue.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Exceptions from Superior Court, Providence and Bristol Counties; Edward W. Blodgett, Judge.

Action by Mary C. McHugh against Williams & Payton. Verdict for plaintiff, and defendants prosecute bill of exceptions. All exceptions overruled except one, which is sustained, and another not considered, and case remitted for new trial.

Charles A. Walsh, of Providence, for plaintiff.

Green, Hinckley & Allen, of Providence (Abbott Phillips and Clifford A. Kingsley, both of Providence, of counsel), for defendants.

SWEENEY, J. This is an action of trespass on the case for negligence to recover damages for personal injuries sustained by the plaintiff on account of the negligent handling of acid by the defendants. The jury returned a verdict for the plaintiff, and the defendants duly filed a motion for a new trial, which was denied by the trial justice after hearing the parties, and the defendants then duly prosecuted their bill of exceptions to this court.

[1] At the time of the accident, in February, 1918, the defendants were manufacturers of jewelry. Their place of business was on the third floor of a manufacturing building, and the plaintiff was an employee of another manufacturing company that occupied a portion of the floor space directly beneath that occupied by the defendants. The defendants used acid in connection with their business, and on the 20th day of February, 1918, a carboy of sulphuric acid commenced to leak and a quantity of it went through the floor and some of it fell upon the plaintiff and she was severely burned. The defendants' fourth and fifth exceptions are to the exclusion of questions to the plaintiff on cross-examination asking her if she made any claim against her employers under the Workmen's Compensation Act (Laws 1911-12, c. 831), and if her employer paid her under the Workmen's Compensation Act for this particular accident. The defendants claim the right to ask these questions under

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the provisions of section 7, art. 1, of the Workmen's Compensation Act, as it provides that—

"The right to compensation for an injury, and the remedy therefor granted by this act, shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise; and such rights and remedies shall not accrue to employees entitled to compensation under this act while it is in effect."

The only plea filed was that of the general issue. If the plaintiff had been paid compensation by her employer in accordance with an agreement made under the provisions of the Workmen's Compensation Act, the defendants should have specially pleaded the agreement in bar, as this is a statutory defense of recent origin, and did not exist at common law. These exceptions are overruled.

[2] The sixth exception is to the ruling of the trial justice permitting a certain hypothetical question to be asked of the defendants' expert witness. The answer to the question was not prejudicial to the defendants, and therefore the exception is overruled.

[3] The seventh exception is to the denial of the defendants' motion to direct a verdict. The first count charges that it was the duty of the defendants to use reasonable care in placing these acids and in the care of the same, so that they might not leak upon persons on the floor beneath, and that the defendants placed the acids in a position in their factory so that some of it leaked and burned its way through the floor and down upon the plaintiff. The plaintiff introduced evidence to support this court, and therefore it would have been error for the court to have directed a verdict for the defendants.

[4] The tenth exception is to that portion of the charge as follows:

"What was the duty of the defendants with respect to care? Of course, it was their duty, gentlemen, to handle this acid so that it would not injure innocent parties in any other section of the building; and to accomplish this it was the duty of the defendants to use what would be called ordinary care and diligence for the safety of these people."

This is a correct statement of the law applicable to the case, and the exception is overruled.

[5] The eighth, ninth, and eleventh exceptions relate to portions of the charge which refer to facts in evidence as bearing upon the conduct of the defendants in the performance of the duty they owed the plaintiff in using ordinary care under the circumstances to properly care for said acid. It was proper for the court thus to refer to the facts in evidence, and as there is no misstatement of fact or error of law these exceptions are overruled.

[6] The twelfth exception is to that portion of the charge of the court wherein it said:

"Of course, it is the general rule that for a latent defect which cannot be discovered the defendant is not liable, but that leaves to you for consideration the first matter which I brought to your attention, whether they made such an investigation of these flasks as would lead them absolutely to know that all the rest of them were sound and that there was no crack in them."

This exception must be sustained, as the defendants were required to use only ordinary care and diligence in making an investigation as to the condition of the soundess of the flasks, and not make such a particular investigation of them as would lead them absolutely to know that they were sound.

"Ordinary care is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended. The greater the danger the higher the degree of care required to constitute ordinary care, the absence of which is negligence. It is a question of degree only. The kind of care is precisely the same." Beerman v. Union R. R. Co., 24 R. I. 275, 280, 52 Atl. 1090, 1091.

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To require the defendants to make such investigation of the flasks as to absolutely know their condition would require them to exercise the highest degree of care under the circumstances, or to be insurers of the condition of the flasks, and this degree of care is not required in the case at bar, but only ordinary care under the circumstances and conditions.

The first three exceptions were waived. All of the other exceptions are overruled, with the exception of the twelfth, which is sustained, and the thirteenth, which is to the denial of the defendants' motion for a new trial, which is not considered.

The case is remitted to the superior court for a new trial.

SOUTHERN SURETY CO. ET AL. v. NELSON ET AL. (No. 7862.)

(Court of Civil Appeals of Texas. Galveston. April 22, 1920. Rehearing Denied May 20, 1920.)

223 Southwestern Reporter, 298.

1. MASTER AND SERVANT — JURISDICTION OF DISTRICT COURT NOT DEPENDENT ON FORMAL NOTICE TO ACCIDENT BOARD THAT COMPENSATION CLAIMANT WILL NOT ABIDE ITS DECISION.

Under Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246q), where beneficiaries of deceased servant filed claim with Industrial Accident Board before they filed suit against insurers, thus evidencing consent to adjudication by board, but no notice was issued by board to insurers to answer claim, and no section was taken by board in adjudicating it, it cannot be held jurisdiction of district court to adjudicate matter could not attach until formal notice had been given board by beneficiaries that they would not abide its decision; act not requiring such notice.

(For other cases, see Master and Servant, Dec. Dig. § 396.

2. MASTER AND SERVANT — COMPENSATION INSURANCE SUBJECT TO STATUTORY PENALTY FOR DEFAULT IN PAYMENT.

The fact that policies of accident insurance were issued under the Workmen's Compensation Act does not affect application of Vernon's Sayles' Ann. Civ. St. 1914, art. 4746, providing 12 per cent. damages for failure to pay promptly.

(For other cases, see Master and Servant, Dec. Dig. § 391½, New, vol. 7A Key-No. Series.)

3. MASTER AND SERVANT — DROWNING BY CAPSIZING OF DREDGE DURING STORM NOT ACT OF GOD PRECLUDING RECOVERY OF COMPENSATION.

Where an employee was accidentally drowned while on a dredge on account of a violent storm, recovery on the employer's insurance policies could not be defeated under the Workmen's Compensation Act on the ground the accident was an act of God.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

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Appeal from District Court, Galveston County; H. C. Hughes, Judge.

Suit by Thomas P. Nelson and others against the Southern Surety Company and others. From judgment for plaintiffs, defendants appeal. Reformed and affirmed.

J. A. Germany, of Dallas, Frank S. Anderson, of Galveston, and T. H. McGregor, of Houston, for appellants.

Maco & Minor Stewart, A. J. De Lange, Jules Damian, and W. N. Zinn, all of Galveston, for appellees.

PLEASANTS, C. J. Appellees, as the surviving beneficiaries of Adolph Nelson, deceased, brought this suit to recover compensation alleged to be due them upon policies of insurance issued by appellants under the provisions of the Workman's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246h et seq.). The deceased, Nelson, was employed by the Standard American Dredging Company, and was drowned while in the performance of the duties of his employment in the Texas City channel on the 16th or 17th day of August, 1915, by capsizing of the dredgeboat.

The defendants answered by general demurrer and general denial, and by special exception and plea, in which they set up:

"That the Industrial Accident Board of the state of Texas had original and exclusive jurisdiction to determine all questions arising under the Employers' Liability Act in respect to the alleged claim sued upon in this cause; that the jurisdiction of said Industrial Accident Board attached to the alleged claim growing out of the alleged death of the said Adolph Nelson, and that no notice was ever filed with, or served upon said board, by any or either of the plaintiffs, or by said defendants, of unwillingness to abide the final ruling and decisions of said board in respect to the question arising under said act in relation to the death of said Adolph Nelson, and no objection was made, served, or filed with said board in respect thereto, whereby said board has never been ousted of its jurisdiction, and still retains jurisdiction to hear and determine any and all disputed questions arising under said act in respect to the death of said Adolph Nelson. that the questions arising in respect to the alleged claim of the plaintiffs herein have not been settled by an agreement of the parties interested, and that by reason of all of the foregoing the plaintiff's are not entitled to have or maintain this suit."

Plaintiffs, by supplemental petition, denied all the allegations of the defendants' amended answer. The case was tried before a jury, to whom it was submitted upon special issues. Upon return of the verdict judgment for plaintiffs was entered on February 27, 1919, for the sum of $1,981.70.

Appellants' first complaint against the judgment is that the court erred in not sustaining their plea to the jurisdiction on the ground that no notice of unwillingness on the part of appellees to abide by the final ruling and decision of the Industrial Accident Board in the matter of compensation due them by appellants having been filed with or presented to said board, the exclusive original jurisdiction of the board to determine the issues raised by this suit remains with said board, and therefore appellees cannot maintain this suit. The controlling provisions of the statute (article 5246q) are as follows:

"All questions arising under this act, if not settled by agreement of the parties interested therein, shall, except as otherwise herein provided, be determined by the Industrial Accident Board. Any interested party who is not willing, and does not consent to abide by the final ruling and decision of said board on any disputed claim may sue on such claim or may require suit to be brought thereon in some court of competent jurisdiction, and the board shall proceed no further toward the adjustment of such claim: Provided, however, that whenever any such suit is

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brought, the rights and liabilities of the parties thereto shall be determined by the provisions of this act, and the suit of the injured employee, or person suing on account of the death of such employee shall be against the association, if the employer of such injured or deceased employee is at the time of such injury or death a subscriber, as defined in this act, in which case the recovery shall not exceed the maximum compensation allowed under the provisions of this act, and the court shall determine the issues in such cause instead of said board."

This statute does not by its terms provide that the interested party who is not willing and does not consent to abide by the ruling and decision of the board must so notify the board before such party can bring suit on his claim, and there is no rule of construction under which such provision can be implied. The right to sue if the interested party is not willing and does not consent to abide by the decision of the board is conferred in express words and is not conditional upon any formal notice to the board. There could be no clear indication of unwillingness and want of consent of an interested party to abide by the decision of the board than the filing of a suit to enforce his claim, and upon the filing of such suit before any action has been taken by the board in the adjudication of the claim the jurisdiction of the board to adjudicate the matter ceases.

It is, we think, manifest from the language of the statute quoted that the jurisdiction of the board depends entirely upon the consent of the interested parties. Such consent is evidenced by the subscriber and the insurance company by the application for and issuance of the insurance policy, and by the injured party or his beneficiaries by presenting the claim to the board for adjudication and thus invoking its jurisdiction.

[1] The filing by the appellees of their claim with the board before they filed this suit evidenced their consent to an adjudication by the board of their claims; but no notice was ever issued by the board by the appellants to answer the appellee's claim, and no action taken by the board in the adjudication of the claim. In these circumstances it cannot be held that the jurisdiction of the district court to adjudicate the matter could not attach until formal notice had been given the board by appellees that they would not abide by its decision. The statute does not, as before shown, in terms require such notice, and the constitutional jurisdiction of our courts should not be limited or ousted by implication, nor should the right of the citizen to sue in the courts provided by the constitution to hear and determine his complaints be restricted or burdened by conditions precedent, unless by the express terms or necessary implication from the language of the statute. If an adjudication had been had by the board before this suit was filed, without any objection on the part of appellees, or any notice to the board that they would not abide by its decision, it may be that such decision would have been final, and appellees could not thereafter have resorted to the courts for an adjudication of their claims. This was the holding by the Court of Civil Appeals for the Sixth District in the cases of Insurance Co. v. House, 191 S. W. 155, and Roach v. Texas Employers' Association, 195 S. W. 328, and by the Court of Civil Appeals for the Fifth District in the case of Insurance Co. v. Curtis, 200 S. W. 1162. The Supreme Court has granted a writ of error in the Roach Case, and until a decision of the question by that court the holding in the cases cited cannot be regarded as determining the question.

The holding in the cases cited is not in conflict with our conclusion that the filing of a claim with the board without any action thereon by the board would not deprive the courts of jurisdiction to hear and determine a suit brought on the claim without notice to the board that the claimant would not abide its decision.

[2] It is further urged that the judgment should be reversed because the death of Adolph Nelson was caused by an act of God, and therefore appellants are not liable to his beneficiaries upon the policies

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sued on in this case, which were issued under the provisions of the Workmen's Compensation Act. This question was decided adversely to appellant in the case of Surety Co. v. Stubbs, 199 S. W. 343, a case in which the deceased, compensation for whose loss the suit was brought, was drowned by the capsizing of the same boat at the same time the deceased in this case lost his life. We adhere to the conclusions expressed in the Stubbs Case and cannot sustain appellants' contention.

[3] By cross-assignments appellees complain of the judgment in that it does not award them the 12 per cent. provided by the statute as a penalty for the failure of appellants to pay the sum due under the policy after demand, as provided by the statute. The record shows that demand was made upon appellants for payment of the amount due appellees under the policies sued on more than 30 days before this suit was filed and appellants failed to make any payment on such demand. Appellants are accident insurance companies and the policies sued on are accident insurance policies. The fact that such policies were issued under the Workmen's Compensation Act does not, we think, affect the application of the statute (article 4746, Vernon's Sayles' Civil Statutes), which provides:

"*Losses Shall be Paid Promptly.*—In all cases where a loss occurs, and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss."

We think the cross-assignment should be sustained, and the judgment of the trial court reformed, so as to award appellees 12 per cent. damages on the compensation adjudged to be due them by appellants, and, as so reformed; the judgment should be affirmed.

Reformed and affirmed.

GEO. A. LOWE CO. ET AL. v. INDUSTRIAL COMMISSION OF UTAH. (No. 3484.)

(Supreme Court of Utah. June 29, 1920. Rehearing Denied July 15, 1920. 190 Pacific Reporter, 934.

1. MASTER AND SERVANT—EVIDENCE HELD TO SHOW DEPENDENCY WITHIN COMPENSATION LAW.

In a proceeding for compensation claimed by father and mother of deceased servant, evidence *held* to establish the partial dependency of the claimants within Laws 1917, c. 100, as amended by Laws 1919, c. 63.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

2. MASTER AND SERVANT — FINDING OF DEPENDENCY WITHIN COMPENSATION LAW CONCLUSIVE.

The decision of the Industrial Commission is conclusive on the question of dependency of claimants awarded compensation for the death of a servant, where sustained by some substantial testimony.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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3. MASTER AND SERVANT — COMPENSATION AWARD NOT INVALIDATED BY FAILURE TO FIND DAILY WAGE.

Claimants having established partial dependency on deceased servant under Laws 1919, c. 63, amending Comp. Laws 1917, § 3140, subd. 3, an award based on the average weekly wage was not invalid because the commission failed to make a finding as to amount of the daily wage, especially where under the evidence the only finding that could have been made would justify the award.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

4. MASTER AND SERVANT — AMOUNT OF COMPENSATION AWARDED NOT REVIEWABLE.

Where the amount of compensation awarded by the Industrial Commission is sustained by some substantial evidence, it is not the province of reviewing court to disturb it.[1]

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Petition by Robert J. Eames and wife, as father and mother and Lucy K. Eames, to the Industrial Commission of Utah for an award against Geo. A. Lowe Company, employer. Award granted. Application for rehearing denied, and the employer and the Ætna Life Insurance Company insurer, bring certiorari to the Industrial Commission. Award sustained.

De Vine, Stine & Gwilliams, of Ogden, for plaintiffs.

Dan B. Shields, Atty. Gen., and Chez & Barker, of Ogden, for defendant.

CORFMAN, C. J. On the 27th day of December, 1919, George W. Eames, of Harrisville, Utah, met his death by reason of an accident arising out of and in the course of his employment with the plaintiff Geo. A. Lowe Company. The plaintiff Ætna Life Insurance Company was the insurance carrier of Geo. A. Lowe Company.

Under the provisions of chapter 100, Laws of Utah 1917, as amended by chapter 63, Laws of Utah 1919, Robert J. Eames and Lucy K. Eames, the father and mother of said George W. Eames, filed their petition for compensation with the Industrial Commission of Utah, claiming that they were dependents of the decedent. After the issues were joined and a hearing had, the said commission made an award against the plaintiff Geo. A. Lowe Company, granting to the said claimants compensation at the rate of $11.25 per week for a period of 284 weeks, but not to exceed $3,199. After an application for a rehearing, which was denied by the commission, the proceedings were brought to this court for review under a writ of certiorari sued out by the plaintiffs. They contend that the award made by the commission should not be sustained: First, for the reason that the evidence was insufficient to establish the dependency of the claimants; secondly, that the commission failed to make any finding of the average weekly wage of decedent; and, thirdly, that the award made was excessive.

[1, 2] The record shows that claimants are the parents of the decedent. They owned and lived upon a farm heavily incumbered by a mortgage. Their family included two daughters, under age, the decedent and his grandparents, all of whom reside together and were dependent upon the income from the farm for the necessaries of life. The decedent, age 20 years and 10 months, had assisted his parents in doing the general farm work, except when occasionally employed elsewhere, at

[1] Evans v. Ind. Com. of Utah, 174 Pac. 825; Reteuna v. Ind. Com. of Utah, 185 Pac. 535.

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which times he would contribute his earnings to the family support, including apparel for himself and at times for other members of the family. At the time of the accident in which decedent was killed he was an employee of the plaintiff Geo. A. Lowe Company and had been earning under said employment $3 25 per day 6 days in a week, for a period of about 3 months. During the time he was thus engaged with the Geo. A. Lowe Company he had obtained his lodging and meals without charge at claimants' home. On account of his absence from work on the farm it was arranged between himself and the claimants that he should contribute his earnings in payment of other help employed to assist in doing the farm work. As to the exact amount in dollars and cents derived from, and the full extent of, the dependency of claimants upon the decedent, the record is not certain and clear, but that they were dependent upon and that they received practically all of decedent's earnings and the benefits of his labor cannot be doubted from a reading of the evidence. All that may be said in this connection is that decedent was at the time of the accident capable of and was earning $3.25 per day, that all of his life he had contributed his labor and earnings to the support of claimants, and that there is substantial evidence in the record tending to show that claimants were dependent upon decedent's labors and earnings for the support and maintenance of themselves and the members of their family. Dependency in this class of cases has been universally held to be a question of fact to be determined by the commission, not the reviewing court. Dosker's Compensation Law, § 170.

Under the facts and circumstances of this case as disclosed by the record, we think partial dependency of the claimants was fully established within the purview and meaning of our statute. Further, the decision of the commission was final and conclusive on this question as well as all other questions of fact where there is some substantial testimony in the record to sustain it. Smith v. National Sash & Door Co., 96 Kan. 816, 153 Pac. 533; Herrick Case, 217 Mass. 111, 104 N. E. 432; In re Kelly's Case, 222 Mass. 538, 111 N. E. 395; Walz et al. v. Holbrook, Cabot & Rollins Corp., 170 App. Div. 6, 155 N. Y. Supp. 703.

[3] The next question presented by the plaintiff is whether or not the failure of the commission to make a finding as to the daily wage of decedent at the time of the accident invalidates the award.

Having established partial dependency upon the decedent, under the provisions of section 3140, subd. 3, as amended by chapter 63, Laws of Utah 1919, claimants were entitled to "60 per cent, of the average weekly wages, but not to exceed the maximum of $16 00 per week, and to continue for all or such portion of the period of six years after date of the injury as the commission in each case may determine, and not to amount to more than a maximum of $5,000.00."

The evidence shows beyond any dispute that decedent was earning at the time of the accident $3.25 per day. The commission failed to make any such finding. Had the commission made a finding, no other finding than one to that effect could have been made under the evidence before it. There appears in the record, however, a purported copy of an unsigned stipulation certified under seal by the clerk of the commission "that the wage earned by decedent at the time of the accident was $3.25 per day, working 6 days per week." By permission of the court an affidavit made by the referee was filed, stating in substance that the said stipulation with respect to wages earned by decedent was a clerical error, and that no such stipulation was made by the interested parties. Be that as it may, we find no express requirement in the act that such a finding is necessary to a valid award, and in any event we cannot conceive of any good reason why an award should be set aside by reason of such failure and the case referred back to the commission when, as in this case, no other finding could be made under the evidence than that de-

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cedent earned $3.25 per day at the time of the accident. Such a finding would, if the case were referred back to the commission, be the only finding in that regard that could be made, and not only that, but it would support the award, be conclusive, and not subject to review by this court, in view of the testimony heretofore pointed out.

Notwithstanding the liberal provisions of our statute with respect to proceedings held by the commission, we think it would be better, although not legally essential, if the commission would in all cases make findings upon which they predicate an award.

[4] Lastly, the plaintiffs complain that the award made is excessive. They assign many reasons in support of their contention. We will not pause to discuss them in detail. As we view the record under consideration, the award made by the commission did not exceed the powers granted to it by the statute. Both the matter of dependency and the amount to be awarded were questions of fact for their ascertainment and determination from the evidence before them, and it is not by statute or otherwise made our province as a reviewing court to disturb the award so long as there is some substantial evidence to sustain it. Murphy's Case, 218 Mass. 279, 105 N. E. 635; Appeal of Hotel Bond Co., 89 Conn. 143, 93 Atl. 245; Evans v. Ind. Com. of Utah, 174 Pac. 825. Reteuna v. Ind. Com. of Utah, 185 Pac. 535.

Under the provisions of the act our review is confined in this class of cases to certain defined and fixed subjects and can be extended no further than to determine whether or not:

"(1) The commission acted without or in excess of its powers; (2)if findings of fact are made, whether or not such findings of fact support the award under review."

We think the jurisdictional facts entitiling the commission to exercise its powers in the present case were fully and completely established by the proceedings as shown by the record before us. There can be no doubt about that. If there had been full and complete findings instead of only partial findings made by the commission, such findings of fact would have amply supported the award. Failure in that regard, therefore, should not defeat the purposes of the act to secure for employees and their dependents the prompt payment of compensation under its provisions. A substantial compliance with its provisions is all that is legally required. The act itself provides:

"A substantial compliance with the requirements of this act shall be sufficient to give effect to the orders of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto."

In this case we think the record conclusively shows that the claimants were dependent upon the labors and earnings of the decedent. He was receiving at the time of his death $3.25 per day. The amount earned supports the award. The award made to claimants was within the limit prescribed by the statute, and should be sustained.

It is so ordered.

Frick, Weber, Gideon, and Thurman, JJ., concur.

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BOWNE v. STAMFORD ROLLING MILLS CO. ET AL.

(Supreme Court of Errors of Connecticut. July 20, 1920.)

111 Atlantic Reporter, 215.

1. MASTER AND SERVANT—AWARD OF COMPENSATION CAN BE CONSIDERED IN DETERMINING MODIFICATION.

The original award of compensation, though not subject to be set aside on appeal because not taken within the time specified in Gen. St. 1918, § 5366, can be considered to determine whether the circumstances justify a modification of the award under section 5355 to meet changed conditions.

(For other cases, see Master and Servant ,Dec. Dig. § 419.)

2. MASTER AND SERVANT — SUPPLEMENTAL AWARD IMPROPER AFTER ORIGINAL AWARD ERRONEOUSLY ALLOWED COMPENSATION EQUAL TO THAT FOR SUBSEQUENT DISABILITY.

Where the original award, in addition to the full compensation authorized by Gen. St. 1918, § 5352, for the loss of claimant's toes, which was in lieu of all other compensation for the consequences of that particular loss, awarded further compensation for a period equal to that allowed for the loss of a foot, which award had been paid, it was not proper for the commissioner, after the amputation of the foot became necessary, to make a supplemental award of compensation for the period authorized for loss of the foot.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

3. MASTER AND SERVANT — COMPENSATION FOR INCAPACITY FROM AMPUTATION IMPROPER AS INCLUDED IN AWARD FOR LOSS OF MEMBER.

The award of compensation for 130 weeks authorized by Gen. St. 1918, § 5352, for the loss of a foot, includes compensation for incapacity following the amputation, so that additional compensation for such incapacity is improper.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

Case Reserved from Superior Court, Fairfield County; Howard J. Curtis, Judge.

Proceedings under the Workmen's Compensation Act by Walter S. Bowne, Jr., employee, against the Stamford Rolling Mills Company and others. From a supplemental award of the Compensation Commissioner, the Stamford Rolling Mills Company and others appealed to the superior court, and the appeal was reserved for the advice of the Supreme Court. The superior court advised to vacate supplemental award of the Commissioner.

The supplemental finding and award, which together with the appeal therefrom comprise the record before us, recites the following facts.

The claimant was injured September 12, 1916, suffering thereby the loss of four outer toes and one-half the great toe of his left foot. On February 13, 1917, an award for that injury was made entitling the claimant to receive, in the language of the award, "compensation at the rate of $8.40 per week for a period of 71 weeks for the loss of four outer toes and one-half the great toe and payment of further compensation for disability commencing on September 23, 1916, for a period not to exceed 130 weeks, the number of weeks allowed for the loss of one foot at or

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above the ankle." Satisfaction of this award to the extent of 130 weeks was made before the events hereafter recited took place.

On August 21, 1918, an informal hearing was held before the commissioner in regard to the amputation of the injured foot and it was at that time agreed that the operation should be performed. On August 26, 1918, the foot was amputated at the ankle ,and thereafter the respondent furnished the claimant an artificial foot. Following the claimant's discharge from the hospital where the operation was performed he was incapacitated for a period of approximately 6 months.

The commissioner, upon a reopening of this award and a supplemental hearing, held that the incapacity following the amputation was compensable, and the claimant entitled to compensation in addition to the 130 weeks already paid, "being the number of weeks allowed under the act for the loss of the foot," and made award accordingly. From this award the appeal was taken.

Wilson H. Pierce, of Waterbury, for defendants.

PRENTICE, C. J. (after stating the facts as above). [1] The respondents, while in form appealing from the supplemental modifying order of award of April 20, 1920, seek a review of the original award made February 13, 1917. To this review for the direct purpose of having the terms of the original award set aside they are not entitled at this distance of time subsequent to its having been made. Gen. Stat. § 5366. It does not follow, however, that the terms of the first award may not be and ought not to be taken into consideration when a hearing is being had and a determination made upon a reopening of the matter to determine whether or not changed conditions do not call for a modification of the award already made in order that full and exact justice under the law may be done. The aim of our remedial workmen's compensation legislation is to accomplish that result in so far as is reasonably possible, and its informal machinery and procedure is arranged with that end in view. Hence the fixed and final quality which characterizes judgments in civil actions is not attached to awards of compensation, and the power of modification to meet new conditions as they arise is expressly conferred upon the compensation officials. Gen. Stat. § 5355; Saddlemire v. American Bridge Co., 95 Conn. —, 110 Atl. 63. Therefore it is that upon every application where a modification of an award by an increase of its amount or an additional one is sought, regard must be had to its terms to determine whether or not the existing circumstances and conditions call for such modification in justice and right and if so to what extent.

It is by no means easy to understand the exact meaning and purport of the award of February, 1917, and the reasons which prompted it. The claimant had then suffered the loss of four toes and one-half of the great toe of his left foot, and as far as appears no other injury separately compensable. His foot minus the toes remained with him and continued to for 17 months. Notwithstanding these facts he was awarded compensation at the rate of $3.40 per week, being one-half of the average amount of his weekly wages prior to receipt of his injury, for 71 weeks, in strict accord with the specific provision of statute in such case (Gen. Stat. § 5352) and in addition a further compensation at the same rate for not to exceed 130 weeks, stated in the award to be the number of weeks allowed for the loss of one foot at or above the ankle. In fact, the statutory period prescribed for the payment of the weekly payment compensation in the case of the loss of one foot at or above the ankle is 130 weeks, neither more nor less. The language of the award which states that the 130-week additional award was made for disability, the fact that it was made for a maximum and not a definite term of 130 weeks, and

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the reference in it to its period as being that of the number of weeks allowed for the loss of one foot at or above the ankle import into it elements of uncertainty as to its meaning and purport. But that matter is perhaps one of no great present importance.

[2] Certain it is that an award was made for a substantial sum in excess of that prescribed by statute for the compensable injuries the claimant had then suffered, and that the excess thus awarded as subsequently fully paid strictly conformed to that prescribed for the loss of a foot at the ankle such as this claimant later suffered. If that extra compensation was awarded for disability attendant upon the loss of the toes, it was improperly awarded, since the 71 weeks' compensation fixed by the statute and awarded was exclusive. It is by statute prescribed in lieu of all other compensation for the consequences of that particular loss. Gen. Stat. § 5352; Kramer v. Sargent, 93 Conn. 26, 104 Atl. 490 If, on the other hand, it was made with prophetic provision that the foot would be lost at some time in the future, it would appear and must have appeared to the commissioner upon the supplemental hearing, who was aware that the 130-week award had been fully satisfied, that the claimant had received the full compensation permitted by law for the loss of his foot in addition to an award of the full permisible compensation for the prior loss of his toes.

[3] In either even the commissioner, in examining the award he was being asked to modify, would have seen that the claimant, who was seeking additional compensation subsequent to the amputation of his foot, had already had, although perhaps erroneously, an award or awards for as large a sum or sums as the statutes permitted. He would have seen that the applicant had been awarded, or received under the award, or both, compensation to the full limit authorized by statute, and that he was not, in justice or right, entitled to further compensation. Furthermore, additional award was made, as the commissioner expressly states for incapacity following the amputation. Compensation for that incapacity, following as it did the loss of the foot and by reason of that loss is included in that given for the loss of the member, and not separable from it. Kramer v. Sargent, 93 Conn. 26, 104 Atl. 490.

The superior court is advised to vacate the supplemental award of the commissioner.

The other Judges concurred.

DIAZ v. WARREN BROS. CO.

(Supreme Court of Errors of Connecticut. July 20, 1920.)

111 Atlantic Reporter, 206.

1. MASTER AND SERVANT—INJURIES WHILE GOING FROM WORK HELD NOT TO "ARISE OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Injuries to a workman did not arise out of and in the course of his employment within the Workmen's Compensation Act, where they were received after he had quit work for the day when he attempted to board a motortruck to return home, the truck which had been used in the work being also on its homeward journey, but not then under the control of the

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employer, who rented it by the day, and was under no obligation to furnish transportation.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.

2. MASTER AND SERVANT—INJURY "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT DEFINED.

An injury arises out of the employment within the Workmen's Compensation Act when it occurs in the course of the employment and is the result of a risk involved in the employment, or incident to it or to the conditions under which it is required to be performed, and in every case there must be a causal connection between the injury and the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Appeal from Superior Court, New Haven County; Donald T. Warner, Judge.

Proceedings by Fred Diaz under the Workmen's Compensation Act (Pub. Acts 1913, c. 138), to obtain compensation for personal injuries, opposed by the Warren Bros. Company, the employer. There was an award of compensation, which was affirmed by the superior court, and the employer appeals. Error and judgment set aside.

On September 8, 1919, and for a considerable time prior thereto, the respondent was and had been engaged in executing contracts for the grading and surfacing of streets in the city of Waterbury. These streets were often widely separated, and a large number of workmen were regularly employed upon the different contracts. Among these employees was the claimant, who, at the time of the injury sustained by him, was employed on the work in the execution of one of these contracts. A necessary instrumentality in the conduct of the respondent's business was a large motortruck for the conveyance of materials, tools, and so forth from one place to another. The company, not having one of its own available for use in Waterbury, rented one from other persons, paying for its use an agreed price per day. This truck was not under the control of the respondent until it in the morning reached the point where it was to work, nor after 6 o'clock in the afternoon when its day's work was finished. On occasions it was necessary to move tools and workmen from one place to another widely separated it was used to accomplish such removal. Customarily, as the respondent was aware, the claimant and other of his fellow workmen, after the close of the day's work, rode upon it to the center of the city on their way home, when the distance was a substantial one. The claimant's contract of employment did not provide that he should be transported from his home to his place of work, or back home after his day's work was done.

The day's work having been finished on September 8, 1919, some of the workmen having put up their tools, got on to the truck to ride to the city, whither it, having also finished its day's work, was going. The claimant and two other men were working at a point a few hundred feet nearer the city, and when the truck came along they attempted to get aboard it while it was in motion. This the complainant's companion succeeded in doing, but he slipped and fell under one of the wheels and was injured. The claimant's attempt to board the truck did not amount to serious and willful misconduct on his part.

Daniel J. Donahoe, of Middletown, for appellant.
Arthur W. Upson, of New Britain, for appellee.

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PRENTICE, C. J. (after stating the facts as above). [1] The claimant at the time he was injured, had completed his day's work for the respondent, put away his tools, and started to go home. In the pursuit of this latter purpose he was engaged in no service for which he was employed nor any incident of it, and in no attempt to advance the latter's interests. He was intent solely upon an affair of his own, to wit, reaching his home. His employer was under no obligation, contractual or otherwise, to furnish him transportation, as was the case in Swanson v. Latham, 92 Conn. 87, 101 Atl. 492. It, therefore, had no atom of authority over the method resorted to by him to reach his destination. He was bent upon his own errand, and was not otherwise connected with his employer or his employment than is every workman who walks, rides with a friend, or patronizes a trolley or steam car line to traverse the distance which separates his work from his home.

The truck upon which he was attempting to secure a lift on his homeward journey at the time he was injured by a fall therefrom neither belonged to the employer nor was under its control at the time. It was not then an instrumentality employed in the conduct of its business. It had, it is true been such instrumentality during the working hours of the day; but those hours had passed, and with their passage its service as an instrumentality of the respondent had for the time being been terminated, and, like the claimant, it had started on its homeward journey. Like him it was at the time of the accident engaged in no attempt to advance the interests of the respondent, but was engaged upon a matter purely of its own concern. The respondent had no control or right of direction over its movements whatsoever. Whether it went directly to its destination unloaded or sought a load on its way, welcomed persons to a free ride or took passengers for pay, was a matter of no concern to the respondent, and it was in no position to interpose objections or directions in those regards. As it could not rightfully object, its failure to volunteer objections could not be imputed to it as accomplishing through acquiescence in it an assumption of responsibility for what the truck or its driver did, as the commissioner appears to have done.

We are unable to discover a single fact upon which the commissioner's conclusion could properly be based that the claimant's injuries arose out of and in the course of his employment. As well might it be said that an injury received by the claimant on his way home, had he according to his known custom, been riding, or attempting to ride, in a trolley car, or for that matter walking, had that been his known custom, was one arising out of and in the course of his employment. In no essential particular would the situations thus presented differ from that presented here.

To be sure the finding states that the claimant was an ignorant man, speaking and understanding English very indifferently, that he had no knowledge either that the truck upon which he attempted to ride did not belong to the respondent or of the nature of the contract of hiring under which it was used, and that he supposed and believed, as he naturally might, that he could ride thereon from his place of work to or toward his home. He, at least, knew that his employer had assumed no responsibility for his transportation, and neither his ignorance nor his unfounded belief in the matter covered by the commissioner's finding, to which the respondent did not contribute by misrepresentation or other form of deception, can add anything to the latter's responsibility upon the facts as they actually were.

The commissioner, in his memorandum of decision, places reliance for his conclusion that the claimant is entitled to compensation for his injury as one arising out of and in the course of his employment upon the decisions of this court in Fiarenzo v. Richards & Co., 93 Conn. 581, 107

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Atl. 563, and Marchiatello v. Lynch Realty Co., 93 Conn. ——, 108 Atl. 799, and the court below cites the latter case as announcing principles as justifying the conclusion at which the commissioner arrived. We fail to discover anything more than the most superficial similarity between the circumstances presented by those cases and the conditions here shown, and no principle enunciated in either which furnishes any warrant for holding that the present claimant's injury arose out of and in the course of his employment

In the Fiarenzo Case the injured man and the truck from which he fell were both engaged in the performance of the master's business, and at the moment of accident both he and it were proceding from a point where their duties had called them to another point to which continuance of their duties required them to go. The question at issue, answered in the negative, was whether or not the injured man, in attempting to ride upon the truck instead of walking, had so far departed from his employment that his injury could not be regarded as arising out of it and in the course of it.

In the Marchiatello Case the injured man was engaged in the performance of his duties as night watchman when he was shot. The pistol, whose bullet accasioned the injury, was one which was kept lying upon a desk in the room in the employer's temporary construction office, located in an outlying district. This room was one of three in the building, and was occupied by a foreman and paymaster, who, in the latter capacity, frequently had large sums of money in his possession. One Sunday morning a boy, who was an employee of the respondent, although not found to have been so employed on the day in question, entered the office, and, seeing the pistol on the desk where he had seen it before, was prompted by curiosity to examine it. During the examination it was accidentally discharged, with the consequence that the claimant, who was in the next room, was hit by the bullet. The question presented for the decision and affirmatively decided was whether there was a causal connection (using that term in the sense in whch it is frequently employed in workmen's compensation cases (see Fiarenzo v. Richards & Co., 93 Conn. 581, 107 Atl. 563), between the injury and the injured man's employment or the conditions of that employment. The claimed analogy between the facts thus recited and those presented by the case at bar utterly fails, since no one concerned in the present misadventure was, at the time of its occurrence, engaged in the perfomance of any duty owed to the respondent or in an attempt to advance its interests, and no conditions of the claimant's employment were present in the situation.

[2] In the course of its opinion in the Marhciatello Case, the court lays down the guiding principle to be applied in determining whether or not an employee's injury arises out of his employment as follows:

"An injury arises out of an employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. The injury is thus a natural or necessary consequence or incident of the employment or the conditions under which it is carried on. Sometimes the employment will be found to directly cause the injury, but more often it arises out of the conditions incident to the employment. But in every case there must be apparent some causal connection between the injury and the employment, or the conditions under which it is required to be performed, before the injury can be found to arise out of the employment."

This, we take it, is the statement of principle relied upon by the commissioner and the court below for their conclusion. The conditions stated, however, are not satisfied in the circumstances of the present case. There was no connection between the injury and the claimant's employment or the conditions under which it was required to be performed. It is true that the truck, an instrumentality used in the employee's business during

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business hours, played a part in the accident, but it was not such an instrumentality at the time of the accident, and as neither it nor the claimant was engaged at the time the claimant's injury was suffered in doing anything connected with the employment or incidental to it, it could not have resulted from a risk arising out of the conditions in which the employment was carried on.

It is, of course, true, as the commissioner points out, that the claimant's right to compensation would not be defeated by either the fact that the respondent did not own the truck, or that the clock indicated that the hour was passed when his day's work terminated. Carter v. Rowe, 92 Conn. 82, 101 Atl. 491; Merlino v. Conn. Quarries Co., 93 Conn. 57, 104 Atl. 396; Sala v. American Sumatra Tobacco Co., 93 Conn. 82, 105 Atl. 346. It does not exist because there was no relation of employer and employee between the parties at the time of the injury. and the injuries suffered did not arise out of the conditions connected with the injured man's employment by the respondent. They, on the contrary, arose out of conditions created solely by the entirely independent and voluntary action of parties bearing no present employment relation to that company.

There is error, the judgment of the superior court is set aside, and the cause remanded for the retention of a judgment vacating the award of the commissioner.

The other Judges concurred.

FAIR v. HARTFORD RUBBER WORKS.

(Supreme Court of Errors of Connecticut. Aug. 5, 1920.)

111 Atlantic Reporter 193.

1. MASTER AND SERVANT—COMPENSATION AS FOR "TOTAL PERMANENT INCAPACITY" HELD ALLOWABLE TO ONE-EYED EMPLOYEE FOR LOSS OF SIGHT.

Under Workmen's Compensation Act (Gen. St. 1918, §§ 5351, 5352) employee who had previously lost sight of left eye, and was hit in the right eye, so that he was rendered totally and permanently blind, *held* entitled to award for total permanent incapacity under section 5351, i. e., to a weekly compensation of one-half his weekly earnings at the time of the injury for 520 weeks.

(For other cases, see Matser and Servant, Dec. Dig. § 385[11¼].)

2. MASTER AND SERVANT—COMPENSATION COMMISSIONER EMPOWERED TO REOPEN AWARD FOR MISTAKE OF FACT.

Under the Workmen's Compensation Act (Gen. St. 1918, §§ 5355, 5361), compensation commissioner, who, supposing employee deprived of sight of right eye was not one-eyed man, as was in fact the case, approved voluntary settlement on that basis, *held* empowered to reopen his award to make proper award on a basis of total and permanent incapacity through blindness; the rules governing reopening of decree for mistake, alleged by nondiligent private suitors, being inapplicable to such awards in which the state is interested.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Case reserved from Superior Court, Hartford County; William M. Maltbie, Judge.

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Action by George Fair against the Hartford Rubber Works. On reservation of questions of law arising on formal award by the Compensation Commissioner for the First Congressional District upon the facts found by him. Superior court advised the commissioner has power to reopen his award, etc., and to render judgment accordingly.

It appears from the finding of the commissioner: That on the 16th day of May, 1919, he approved a voluntary agreement of settlement between the claimant and the respondent, reciting that the average weekly wage of the claimant, computed in accordance with the statute, was $16.84, and that on or about January 1, 1919, the claimant sustained an injury arising out of and in the course of his employment, said injury being described in said agreement as follows:

"Hit in right eye with piece of rubber, which reduced the sight of right eye to less than one-tenth of norml vision,"

—and that the respondent contracted to pay the sum of $8.42 for the period of 104 weeks from January 26, 1919. Some three months after the approval of this voluntary settlement the claimant applied to the commissioner to have the original award set aside, and for an award as for total and permanent incapacity sustained therefor. On the evidence introduced at the hearing it appeared that the claimant, prior to the injury recited in the contract of voluntary settlement, had totally lost the sight of his left eye, and that as a result of the injury to his right eye in combination with his antecedent infirmity, claimant was totally and permanently blind. No evidence was introduced at the hearing to show that the incapacity of the claimant since the voluntary agreement of settlement was entered into had increased, decreased, or ceased, or that any changed conditions of fact had arisen with respect thereto. The questions reserved for our decision are whether the commissioner under the conditions stated has power to reopen the claim, and whether the claimant is entitled to compensation for total incapacity under section 5351 of the General Statutes, or for partial incapacity under subsection "G," of section 5352.

Albion B. Wilson, of Hartford, for plaintiff.
Charles Welles Gross, of Hartford, for defendant.

BEACH, J. (after stating the facts as above). [1] We take up first the question of the substantive rights of the claimant under the Compensation Act as it stood at the time of the injury; and, having regard to the general scheme of compensation set forth in sections 5351 and 5352, we are of opinion that the claimant was plainly entitled, under the terms of the statute, to an award for total and permanent incapacity under section 5351. that is to say, to a weekly compensation equal to one-half of his average weekly earnings, at the time of the injury, for 520 weeks. Section 5351, which carries the subtitle, "Compensation for Total Incapacity," provides for compensation based on one-half of the average wage of the claimant at the time of the injury, to be continued not longer than the period of total incapacity, and in no event longer than 520 weeks. Then follows a schedule of injuries, which are to be considered as causing total incapacity and compensation paid accordingly. These include total and permanent loss of sight in both eyes and other injuries equally serious. Section 5352 carries the subtitle, "Compensation for Partial Incapacity," and provides that in such case the weekly compensation "shall be * * * equal to half the difference between his average weekly earnings before the injury and the amount he is able to earn thereafter," to continue during the period of partial incapacity, but not longer than 312 weeks; but for certain enumerated injuries a schedule of specific compensation periods is fixed, graded as to duration accroding to the severity of the injury, and as to these fixed awards the section provided that they should

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be "in lieu of all other payments," and among these specific injuries is included the following:

"For the complete and permanent loss of sight in one eye * * * one hundred and four weeks."

The question is whether a one-eyed man, who suffers an injury arising out of and in the course of his employment destroying the sight of his good eye, whereby he is totally and permanently inacpacitated, is entitled, under the act as it stood in 1918, to compensation for total incapacity under section 5351, or only to the specific compensation provided in section 5352 for the loss of one eye.

The respondent relies on the phrase "in lieu of all other payments," and insists that because the injury in question destroyed but one eye, section 5352 controls. This we think ignores the general scheme of the act, which deals with total incapacity under section 5351 and with partial incapacity under section 5352. The latter section assumes that the injured employee is still able to earn something after an injury, and the compensation which it awards is based on one-half of the difference between the earning capacity before and after the injury. Such a measure of compensation is not applicable to an injury which leaves the employee totally incapacitated from earning anything, and all cases of total incapacity, whether temporary or permanent, are manifestly to be compensated in accordance with section 5351.

It is unnecessary to pursue this question any further. It was practically settled in Saddlemire v. American Bridge Co., 110 Atl. 63, 68, where we said:

"Where the loss of a leg results in partial incapacity, the provision for compensation for loss of a leg applies. Where the loss of a leg in fact results in total incapacity, the provision for compensation for the loss of a leg does not apply."

It is of no consequence that the total incapacity of this claimant is in part due to the fact that he had already lost one eye before suffering the injury in question; the right to compensation depends in each case on the extent to which claimant is in fact incapacitated by the injury. Hartz v. Hartford Faience Co., 90 Conn. 539, 97 Atl. 1020.

[2] The remaining question is whether the commissioner had power under the conditions of fact stated in his finding to reopen his original award. This depends primarily on the proper construction of section 5355 which provides that any award, whether based on voluntary agreement or not, shall be subject to modification upon the request of either party—

"whenever it shall appear to the compensation commissioner that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence, on account of which compensation is paid, has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement or award in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."

Incidentally section 5361 should also be taken into account. It provides for awards based on voluntary agreements, and, among other things, that—

"If said commissioner shall find such agreement to conform to the provisions of this chapter in every regard he shall so approve it."

This agreement did not conform to the provisions of the act in the respect already pointed out, and the commissioner had no right to approve it, and could not have approved it had he been aware of the fact

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that the injury in question resulted in total blindness, and not merely in the loss of the sight of the right eye. It appears from the finding and is agreed by the parties that the commissioner was ignorant of the fact and did not know that the claimant was a one-eyed man at the time of his injury, until the hearing upon the application to reopen the original award. It should be said in this connection that there was no attempt on anybody's part to conceal that fact, but that it was not mentioned in the voluntary agreement because it was then believed to be immaterial.

The respondent points out that there has been no change in conditions of incapacity or fact since the original award, and that the claimant omitted to bring the fact of his total incapacity to the attention of the commissioner when the voluntary settlement was submitted for approval. On the other hand, the statute gives the commissioner the same revisionary power over his award that any court of equity in this state has over its decrees. Courts of equity have inherent power to reopen a decree based on a mistake of fact. They do not ordinarily do so at the instance of a private suitor, who might, in the exercise of reasonable diligence, have correctly informed the court, because the rule of public policy expressed by the maxim "Interest reipublicæ ut sit finis litium" requires that, subject to be well-recognized exceptions, judgments should be final. The awards of compensation commissioners are not subject to this rule. This statute expressly provides that they shall be open to revision until completely performed; and it may be added that, independently of that provision, they resemble interlocutory decrees for the future payment of alimony, rather than final judgments. And a claimant in compensation proceedings is not required, by any rules of pleading or procedure, to make a formal and complete statement of his claim. Moreover, the rule which denies a rehearing to a nondiligent litigant is not applied in cases where the state is interested for reasons of public policy. As pointed out in Powers v. Hotel Bond, 89 Conn. 143, 146, 93 Atl. 245, the Compensation Act expresses a revolutionary change in our public policy in imposing on the employer his share of a common loss in a common industry, and the state is interested in seeing that the employer bears his statutory share of the burden, lest the injured employee should become a public charge.

Finally, we think that these considerations apply with great force to cases of voulntary agreements for compensation, not only because the jurisdiction of the commissioner to approve such agreements is limited, but because section 5361, by requiring that the commissioner shall see that the statutory rights of the contracting employee are protected, recognizes the fact that in making such contracts the employee does not stand on an equal footing with his employer. As this case illustrates, the employee, almost necessarily, takes his legal advice in such cases from his employer.

For these reasons we hold that the commissioner has power to reopen his award, and that he is not precluded by any rule of public policy from reopening it, because the claimant might, in the exercise of that degree of diligence which is ordinarily required of litigants, have brought the facts of his total incapacity to the attention of the comissioner before the original award was made. The rule of public policy applicable to such cases as this is "to carry out the spirit of this chapter."

The superior court is advised that the commissioner has power to reopen his award, and that claimant is entitled to compensation for total and permanent incapacity under section 5351, and is advised to render judgment accordingly.

All concur.

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McDONALD v. GREAT ATLANTIC & PACIFIC TEA CO.

(Supreme Court of Errors of Connecticut. July 20, 1920.)

111 Atlantic Reporter 65.

2. MASTER AND SERVANT — INJURIES TO BOY CROSSING STREET HELD TO HAVE "ARISEN OUT OF AND IN COURSE OF EMPLOYMENT."

Injuries to 11 year old boy employed in store to assist in sweeping, unpacking boxes, running errands, and occasionally waiting on customers, received while crossing street to get drinking water for the general use of store employees, *held* to have "arisen out of and in the course of his employment," within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

3. MASTER AND SERVANT—EMPLOYMENT OF BOY DURING VACATION HELD NOT "CASUAL," WITHIN COMPENSATION ACT.

Employment of 11 year old boy to work in store during summer vacation and to assist in sweeping, unpacking boxes, running errands, and occasionally waiting upon customers, *held* not "casual" within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

(For other definitions, see Words and Phrases, First and Second Seres, Casual.)

4. MASTER AND SERVANT — QUESTION OF DEPENDENCY, WITHIN COMPENSATION ACT, IS ONE OF FACT.

The question of dependency, within Workmen's Compensation Act, is one of fact, and unless the commissioner has applied an illegal standard, or found a fact without evidence, the court cannot review his finding.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

5. MASTER AND SERVANT — "DEPENDENT" WITHIN COMPENSATION ACT, DEFINED.

The test of dependency, within Workmen's Compensation Act, is whether the contributions were relied upon by the dependent for his or her means of living, in view of the class and position in life of the dependent.

(For other cases, see Master and Servant, Dec. Dig. & 388.)

(For other definitions, see Words and Phrases,, First and Second Series, Dependent.)

6. MASTER AND SERVANT—MOTHER, THOUGH USING SON'S EARNINGS, HELD NOT HIS "DEPENDENT" WITHIN COMPENSATION ACT.

The mere fact that mother used son's earnings in the support of the family does not prove that she relied upon those earnings for her means of support, so as to constitute her a "dependent" of son, under Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

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7. MASTER AND SERVANT — "DEPENDENT," WITHIN COMPENSATION ACT, DOES NOT INCLUDE ONE HAVING SUFFICIENT MEANS.

No one is a "dependent," within the Workmen's Compensation Act, who has sufficient means at hand to supply present necessaries, rating them according to the alleged dependent's class and position in life.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

8. MASTER AND SERVANT — WIFE CLAMING COMPENSATION FOR SON'S DEATH PRESUMED TO BE SUPPORTED BY HUSBAND.

In proceedings under Workmen's Compensation Act, a wife living with her husband and claiming compensation for the death of a son will be presumed to be supported by the husband, and to rely upon him alone for such support.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Case Reserved from Superior Court, Hartford County; Frank D. Haines, Judge.

Proceeding under the Workmen's Compensation Act by Rose McDonald for compensation for death of her son, Michael McDonald, opposed by the Great Atlantic & Pacific Tea Company, employer. Award for petitioner by the compensation commissioner, and the superior court, on appeal therefrom, reserved questions to the Supreme Court of Errors. Superior court advised to sustain appeal and render judgment directing commissioner to deny the claim.

The defendant corporation operated a chain of stores, one of which was located at Albany avenue, in Hartford. Its organization consisted of a general superintendent and under him a superintendent, and under them managers, each of whom had direct charge of a store.

The manager of the Albany avenue store on July 3, 1918, was one Howard. Howard had employed the plaintiff's intestate, Michael McDonald, a boy of 11 years of age, to assist in the store in sweeping, unpacking boxes, running errands, and occasionally waiting upon customers.

Michael received for his first week's pay $1, together with certain firewood. He was to receive $3 for the second week. His work was to continue through the summer until his school opened.

He had been in defnedant's employ 10 days when on July 3, 1918, Howard d rected Michael to go across the street to get some drinking water for the general use of the employees of the store, and while he was so engaged he was struck by a passing automobile and in consequence suffered injuries as a result of which he died.

Rose McDonald, the claimant and plaintiff, is the mother of Michael. She lived with her husband, and at the time of Michael's injury the family consisted of her husband, herself, and four children, of whom Michael was the oldest.

The father was in the employ of the New York, New Haven & Hartford Railroad Company and earning weekly a wage of about $22. He is in good health and robust. Rose McDonald, the mother, is in feeble health, and is partially deaf.

The money which Michael earned was turned over to his mother and by her put in the family fund. With it she purchased, among other things, a pair of overalls for Michael, costing 98 cents. The mother intended to make sim lar use of the boy's future earnings if he had continued in his employment.

The commissioner concluded that the injuries to Michael arose out of and in the course of the employment; that his employment was not casual; that the duties he was engaged in performing when injured were

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for the business of the defendant, that the sources of support of the family were the father's wages and Michael's earnings; and that the claimant is a partial dependent of the deceased Michael.

The commissioner rendered judgment in favor of the claimant, subject to the reservation of the following questions, as stated in paragraph 24:

(a) Is the father, who failed to serve notice of claim for compensation under section No. 5360, and did not appear as a party to the action, also a partial dependent under the facts here found?

(b) If so, may an award of $2.50 per week each for the statutory period be made to the father and mother without further proceedings,

(c) If question (b) must be answered in the negative, what supplementary proceedings are necessary and proper to carry out the terms of the act?

The reasons of appeal are as follows:

(1) The compensation commissioner for the First congressional district erred as a matter of law in finding from the evidence that Rose McDonald, mother of Michael McDonald, deceased, was a dependent of the said Michael McDonald.

(2) The said compensation commissioner erred in overruling the claims of the respondent that the claimant could not recover because of illegality of the contract of employment.

(3) The said compensation commissioner erred as a matter of law in finding that the respondent could, not as a matter of law "claim immunity from the terms of the Workmen's Compensation Act on the ground that the employment out of which the injury arose was the result of the illegal acts of its agent."

(4) Said compensation commissioner erred as a matter of law in finding that the said Michael McDonald, deceased, was an employee of the respondent.

(5) The said compensation commissioner erred in overruling the respondent's claim that the employment of the said Michael McDonald, deceased, if there was any such employment, was casual and was otherwise than for the purpose of the respondent's trade or business.

Ralph O. Wells, of Hartford, for plaintiff.

Charles H. O'Connor, of New York City, and William E. Egan, of Hartford, for defendant.

WHEELER, J. (after stating the facts as above). [1]. The trial court at the request of the parties improperly included in the reservation the motion made in the superior court to correct the finding of the commissioner. A motion of that character should not be made the subject of a reservation to this court. The terms of General Statutes, 5783, specifically exclude questions of that character from the questions of law reserved for this court.

Compliance with section 71 of the rules of practice, stating in the reservation that the present determination of this question would be in the interest of simplicity, directness, and economy in judicial action," together with a reasonable ground for such allegation, would seem to be impossible.

Questions involving substantive rights are the only questions proper upon a reservation.

In Ingle v. Case, 46 Conn. 240, the court declined to consider the case reserved "on the ground that the reservation presented for their advice no question affecting the merits of the case, or relating to the jurisdiction of the court, or the sufficiency of the declaration or the pleadings founded upon it."

This rule of practice has prevailed unbroken since this decision; indeed, it prevailed long before that decision.

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The finding of the commissioner is filled with evidential facts and testimony, interspersed with opinions and argument. We have omitted these and arranged the facts in orderly fashion in the statement.

From these it appears that the deceased boy was employed by the manager of one of defendent's stores and continued in this employment with the defendant's knowledge. His employment was by the week and was to continue during the summer for a weekly wage.

While the deceased was engaged in doing an errand by direction of defendant's manager for the benefit of defendant's business he met with his injury.

Clearly the deceased was an employee of the defendant when injured, in the common acceptance of the term, and his injury arose out of that employment. But whether he was an employee within the meaning of that term in the Compensation Act (Pub. Acts 1913, c. 138, as amended by Pub. Acts 1915, c. 288) is another question; it may be that because his employment was in violation of G. S. § 5322, he was not such an employee.

[2] It is quite true, as the commissioner held, the injury to this deceased did arise out of and in the course of his employment.

[3] Another of defendant's reasons of appeal is not tenable. The employment of the deceased boy was not casual.

Thompson v. Twiss, 90 Conn. 444, 451, 97 Atl. 328, 331, is decisive of this point:

"As used in our act, the casual employment means the occasional or incidental employment the employment which comes without regularity. * * * If the employment be upon an employer's business for a definite time, as for a week, or a month, or longer, it is not a casual employment."

Another statement from the opinion makes it clear that the casual worker whose employment when injured was his employer's business is not by our act:

"But the employee who is barred by our act as amended is not merely one whose employment is of a casual nature, but, in addition, one whose employment is not in his employer's trade or business."

A third question raised upon the appeal is whether the commissioner erred in finding that the claimant, the mother of the deceased boy, is a partial dependent of the deceased boy, within the meaning of the act.

The earnings of the boy were turned over to his mother and put into the family fund, and they were one of the sources of support of the family of the deceased. The mother intended to make a similar use of the boy's earnings had he lived.

[4] The question of dependency is by the act made one of fact. And unless the commissioner has applied an illegal standard or found a fact without evidence we cannot review his finding.

[5] The test of a dependent is "whether the contributions were relied upon by the dependent for his or her means of living, judging this by the class and position in life of the dependent."

[6] Mrs. McDonald, the mother, who claims to be dependent, lived with her husband, who presumably was supporting his family from his earnings, which were adequate for that purpose. It does not appear that the mother was supporting this family, or that she needed other support than that given her by her husband, or that she relied upon the earnings of the deceased boy. The mere fact that she used the earnings of the boy in the support of the family does not prove that she relied upon these earnings for her means of support.

[7] "No one can be said to be a 'dependent,' within the meaning of our Compensation Act, who has sufficient means at hand for supplying present necessities, rating them according to the alleged dependent's class and position in life." Blanton v. Wheeler & Howes Co. et al., 91 Conn. 226, 99 Atl. 494, Ann. Cas. 1918B, 747.

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So far as the finding goes, there is nothing to indicate that the husband of plaintiff was not supporting his family, or that the earnings of the boy were reasonably necessary to provide adequate support for the family, or that the duty of supporting this family was on the plaintiff.

We do not intend to imply that a mother, though living with her husband, may not at that time be a partial dependent; or that the earnings of substantial wages by a husband will necessarily prevent his wife, while living with him, from becoming a partial dependent.

[8] We do mean to say that, unless the facts indicate the contrary, a wife living with her husband will be presumed to be supported by him, and him alone, for such support.

[9] The father is entitled to the earnings of his minor son so long as the son continues a member of his family and so long as the father fulfills the parental obligation towards his son.

In view of the conclusion reached, we do not consider the question whether the defendant is relieved of the obligation to pay compensation by virtue of the fact that he was 11years old and the defendant was forbidden by G. S. § 5322, to employ him.

[10] Questions reserved under paragraph 24 are wholly academic, and for that reason we do not consider them.

Reasons of appeal 1 is sustained, and 5 overruled; other reasons of appeal are not considered.

The superior court is advised to sustain the appeal and render judgment directing the commissioner to deny the claim.

All concur.

SPENCER v. MARSHALL ET AL (No. 22591.)

(Supreme Court of Kansas. July 10, 1920.)

191 Pacific Reporter, 468.

(Syllabus by the Court.)

1. MASTER AND SERVANT — EVIDENCE HELD TO SHOW THAT DEFENDANTS WERE OPERATING DRILLING MACHINERY.

The evidence of the plaintiff was sufficient to prove that E. L Fairbanks, J. M. Clover, D. Vensel, Frank Wolfe, and D. B. Golden were operating the oil and gas lease and the drilling machinery thereon, on which the plaintiff was injured, and was sufficient to justify the court in overruling their demurrer to the plaintiff's evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

2. MASTER AND SERVANT — EVIDENCE INSUFFICIENT TO SHOW THAT PLAINTIFF WAS EMPLOYED BY SUBCONTRACTOR; SUBCONTRACTOR'S EMPLOYEE HELD ENTITLED TO RECOVER UNDER STATUTE.

The evidence was not sufficient to establish that the plaintiff, when he was injured, was employed by a subcontractor; but, even if he were so employed, the parties named in the first paragraph of this syllabus were liable to the plaintiff for compensation, under section 5898 of the General Statutes of 1915.

(For other cases, see Master and Servant, Dec. Dig. §§ 361, 405[2].)

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3. MASTER AND SERVANT—EVIDENCE HELD INSUFFICIENT TO SHOW THAT INJURED EMPLOYEE WAS SUBCONTRACTOR.

There was not sufficient evidence to show that the plaintiff was a subcontractor.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

Appeal from District Court, Sedgwick County.

Proceedings under the Workmen's Compensation Act by Harvey J. Spencer, opposed by Deering J. Marshall and others. Judgment for plaintiff against certain defendants, and they appeal. Affirmed.

George Gardner and J. E. McElvain, both of Wichita, for appellants.
Matson & Stearns, of Wichita, for appellee.

MARSHALL, J. E. L. Fairbanks, J. M. Clover, D. Vensel, Frank Wolfe, and D. B. Golden appeal from a judgment in favor of the plaintiff under the Workmen's Compensation Act of 1911. The action was commenced by the plaintiff against Deering J. Marshall, the Commercial Refining Company, C. C. Whittaker, the Seven Fields Oil & Gas Company, E. L. Fairbanks, J. M. Clover, D. Vensel, Frank Wolfe, D. B. Golden, and S. C. Clover. A demurrer to the evidence of the plaintiff was sustained as to the Commercial Refining Company, the Seven Fields Oil & Gas Company, and C. C. Whittaker, and was overruled as to the remainder of the defendants. Evidence for the defense was introduced by them, a verdict for the plaintiff was returned, and judgment was rendered on the verdict. The questions presented arise out of the demurrer of the appellants to the evidence of the plaintiff.

[1] 1. The plaintiff was injured while working on machinery that was then being used in drilling for gas or oil. The appellants argue that they were not owners or operators of the property at the time the plaintiff was injured, January 7, 1917, and that therefore they were not liable to him for compensation. Numerous leases of the property for the purpose of developing gas and oil and numerous assignments of those leases were introduced in evidence. By those leases and assignments it was clearly shown that the appellants at one time were owners of interests in the property. John Risher testified that he was employed as field man and superintendent in charge of drilling on the property from October, 1916, to April, 1917, and that he recalled the incident of the plaintiff being injured while working on the lease. Risher further testified that from October, 1916, to January 15, he was employed by Frank Wolfe, J. M. Clover, S. C. Clover, E. L. Fairbanks, D. Marshall, D. Vensel, P. Elliott, and Henry Rutherman; that he employed Harvey J. Spencer for Frank Wolfe and others to pull the casing; that he knew who owned the lease and interest in the well in which they were working; that it was those parties whom he named as Frank Wolfe and others; that he was not employed by the Commercial Refining Company at the time the plaintiff was hurt; that the Commercial Refining Company took charge of the work on the 15th, about eight days after the plaintiff was hurt, and did not have anything to do with the operation of the lease until after January 15. That evidence was sufficient to establish the fact that the appellants were operating the property and compelled the overruling of their demurrer to the plaintiff's evidence.

But the appellants argue that they had been divested of their interest in the property at the time the plaintiff was injured, by a sale of their rights therein to L. C. Riley and C. C. Whittaker under a written contract dated October 16, 1916, but which, it is contended by the plain-

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tiff, and there was evidence to support that contention, did not take effect until after the plaintiff was injured. There was also evidence which tended to show that the Commercial Refining Company was operating the lease and paying the bills at that time. A question was thus presented on conflicting evidence, and on a demurrer thereto the evidence most favorable to the plaintiff must be considered and the other be disregarded. Acker v. Norman, 72 Kan. 586, 84 Pac. 531. Under all the evidence the jury could have found that the appellants were operating the lease, or could have found that they were not, but that it was being operated by the Commercial Refining Company. The finding of the jury on that evidence is necessarily conclusive.

[2] 2. Another question argued by the appellants is that the evidence showed that the plaintiff was working for Lawrence Spencer, who the appellants claim was a subcontractor, and that therefore Lawrence Spencer was liable to the plaintiff for compensation. Lawrence Spencer testified, in substance, that he was working as manager of a casing crew known as the Santa Fee casing crew; that the plaintiff and four other men constituted the crew; that he collected for them and generally got the gang together; that he got labor hire and 5 cents on the dollar for collecting; that the men paid him out of their salaries; that he called whomever he wanted to go; that they were working for the lease owner; that he got the checks cashed and then divided up the money at times, and at other times the members of the crew were paid individually; and that in this particular instance he was given the check for the whole crew. That evidence does not establish that Lawrence Spencer was a subcontractor; it does establish that he acted for his four companies; that they worked together; and that part of the time he received the wages for all and divided them. The court was compelled to overrule the demurrer of the appellants to the evidence of the plaintiff so far as this question was concerned, and the jury was justified in finding from the evidence that the plaintiff was not working for himself or for Lawrence Spencer, but was working for the appellants.

Even if the plaintiff was working for a subcontractor when he was injured, section 5898 of the General Statutes of 1915 fixes on the appellants liability for compensation to the plaintiff. That section, in part, reads:

"Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, references to the principal shall be substituted for references to the employer, except the amount of compensation shall be calculated with reference to the earnings of the workmen under the employer by whom he is immediately employed."

[3] 3. The appellants in their brief state that—

"It was sought by the defendants in the trial of this case to establish the fact that this plaintiff, being the manager of the Santa Fee casing crew, was responsible for the injuries of the men whom he employed, being a subcontractor. The evidence showed that the plaintiff hired these men and paid their salaries and supplied new men when needed."

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The court is unable to ascertain that this statement corresponds with the evidence as abstracted. That evidence shows that the plaintiff was hired substantially as has been set out.

The judgment is affirmed.

All the Justices concurring.

GARR v. WYATT LUMBER CO. (No. 23826.)

(Supreme Court of Louisiana. June 30, 1920.)

85 Southern Reporter 640

(Syllabus by Editorial Staff.)

MASTER AND SERVANT—COMPENSATION HELD GOVERNED BY STATUTORY PROVISIONS FOR PARTIAL DISABILITY TO WORK.

Compensation of sawmill employee who fell on log carriage and suffered injury, whereby his left arm was paralyzed, *held* governed by Act No. 38 of 1918, § 8, subsec. "c," providing for injury producing partial disability to do work of any reasonable character, not subsection "e," providing only for injury not producing disability to work.

(For other cases, see Master and Servant, Dec. Dig. § 385[8].)

Appeal from Twelfth Judicial District Court, Parish of Sabine; John H. Boone, Judge.

Suit for compensation under the Employers' Liability Act by Zebedee Garr against the Wyatt Lumber Company. From judgment for plaintiff, defendant appeals, and plaintiff ,answering the appeal, prays that the term of payment of the compensation be increased. Judgment annulled, and case remanded, with instructions.

J. C. Henriques, of New Orleans, and S. D. Ponder, of Many, for appellant.

F. M. Wood, W. M. Lyles, and Hardin & Hardin, all of Leesville, for appellee.

O'NIELL, J. This is a suit for compensation under the Employers' Liability Act (Act 20 of 1914, p. 44. as amended by Act 243 of 1916, p. 512, and as amended by Act 38 of 1918, p. 49).

While at work in defendant's sawmill, performing services arising out of and incidental to his employment, plaintiff fell upon the log carriage and suffered a severe injury, as a result of which his left arm was paralyzed. He was earning $18 a week at the time of the accident. The district judge, holding that the case came within the provisions of subsection (e) of section 8 of the Act of 1918, allowed plaintiff 55 per cent. of his weekly wages, that is, he allowed $9.90 a week "for a period not exceeding one hundred weeks," less the sum of $24.50 which had been paid by defendant. The latter has appealed; and plaintiff, answering the appeal, prays that the term of payment of the compensation be increased to 300 weeks.

If the amount of compensation should have been measured by subsection (e) of section 8 of the statute, the court should have determined only the rate of wages per week (not exceeding 55 per cent. of the

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weekly wages of the employee), and should have allowed the amount so fixed or determined for the entire period of 100 weeks. Subsection (e) fixes definitely the period of payment of compensation at 100 weeks, and limits the discretion of the judge, as to the rate that he may allow, to 55 per cent. of the weekly wages that the injured employee had been earning, viz.:

"(e) In cases not falling within any of the provisions already made, where the employee is seriously permanently disfigured about the face or head, or where the usefulness of a member or any physical function is seriously permanently impaired, the court may allow such compensation as is reasonable in proportion to the compensation hereinabove specifically provided in the cases of specific disabilities above named, not to exceed fifty-five per centum of wages during one hundred weeks."

The case, however, does not come within the provisions of subsection (e) of section 8 of the statute, because it does fall within one of provisions theretofore made. Subsection (e), by its express terms, applies only to "cases not falling within any of the provisions already made." Provisions was already made, in subsections (a), (b), (c), and (d), for injuries producing all four classes of disability for work (including certain specified permanent total disabilities and certain specified permanent partial disabilities), viz.: (a) For injury producing temporary total disability; (b) for injury producing permanent total disability (including specifically the loss of both hands, both feet, both eyes, or one hand and one foot); (c) for injury producing partial disability, whether temporary or permanent; and (d) for certain specified permanent partial disabilities, i. e. loss of a thumb, finger, toe, hand, an arm, a foot, leg, or an eye.

Before the enactment of subsection (e), the statute made no provision for an injury not producing disability for work. That subsection was enacted, by Act 243 of 1916, as an amendment or addition to section 8 of the original statute, Act 20 of 1914; and, after a careful analysis of the provisions of the law, in the case of Mack v. Legeai, 144 La. 1017, 81 South. 694, we came to the conclusion that the new paragraph, which is now designated as subsection (e), was applicable only to cases of injury not producing disability for work.

Counsel for defendant contends that subsection (e) is applicable to any injury producing permanent partial disability for work, and that the decision to the contrary in Mack v. Legeai should be overruled. If that were true, the new subsection, (e), would have the effect of abolishing the provisions of subsection (d) for injury producing permanent partial disability.

In the amending statute of 1916 the new paragraph, which is now subsection (e) in section 8, was inserted as an additional paragraph in subsection (d), which otherwise provided only for specific injuries, as the loss of a thumb, finger, toe, hand, an arm, a foot, leg, or an eye. Subsection (c), which originally made provision for those specified injuries as well as for all other permanent partial disabilities generally, was then made to apply only generally to injuries, other than those specified, producing permanent partial disability.

In that situation we said, in the case of Mack v. Legeai:

"What has caused confusion and doubt as to whether the expression 'in cases not falling within any of the provisions already made' excludes the cases provided for in the general provisions of subsection (c), or excludes only the special provisions of the new subsection (d), is that the new paragraph providing for serious permanent injuries, without regard to disability to work, is placed in the same subsection with certain permanent partial disabilities that are specifically described; and they, in turn, are taken out of subsection (c) and put into a subsection of their

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own, as if it were possible to have five classes of disability to do work. There would be no room for misunderstanding if the new paragraph, making provision for serious permanent injuries, 'in cases not falling within any of the provisions already made,' had been given a separate section or subsection, or if the special provisions for the permanent partial disabilities specifically described had been left in subsection (c), where they belong."

In the new arrangement of section 8, in the amending statute, Act 38 of 1918, the new paragraph, making provision for "cases not falling within any of the provisions already made," has been taken out of subsection (d) and is now a separate subsection, designated as subsection (e). Thus the Legislature has removed all doubt that the new subsection is applicable only to cases of injury not producing incapacity for work, as was held in the case of Mack v. Legeai.

The case before us, therefore, is governed by the provision of subsection (c) of section 8 of the Act 38 of 1918, viz.:

"'For injury producing partial disability to do work of any reasonable character, fifty-five per centum of difference between wages at the time of the injury and wages which the injured employee is able to earn thereafter during the period of disability, not, however, beyond three hundred weeks."

It is not possible to determine from the record in this case the amount of the difference between the employee's wages at the time of the injury and the wages that he has been able to earn since the injury occurred. The district judge, considering subsection (c) of section 8 of the statute not applicable to the case, did not attempt to fix or determine the difference between plaintiff's wage-earning capacity before and after the accident; and the evidence on the subject is very vague. We have therefore concluded to remand the case to the district court, to receive further evidence as to plaintiff's loss of wage-earning capacity in consequence of the injury he has suffered, and to allow him compensation under subsection (c) of section 8 of Act 38 of 1918; that is, to allow him compensation at the rate of 55 per cent. of the loss of wage-earning capacity that he suffered as a result of the injury, for the period of his disability, not, however, beyond 300 weeks.

The judgment appealed from is annulled, and it is ordered that this case be remanded to the district court, with instructions to allow plaintiff compensation, under subsection (c) of section 8 of Act 38 of 1918, at such rate per week as will amount to 55 per cent. of his loss of wage-earning capacity as a result of the accident, for the period of his disability, not, however, beyond 300 weeks. For that purpose, the court is to hear such additional evidence as may be deemed necessary. The defendant is to pay all costs of this suit.

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GIGGNDELLE v. PIEDMONT & GEORGES CREEK COAL CO. et al. (No. 40.)

(Court of Appeals of Maryland. June 18, 1920.)

111 Atlantic Reporter 135

MASTER AND SERVANT — COMPENSATION OF REMARRIED WIDOW, WHOSE DEPENDENT CHILD HAS DIED SINCE HUSBAND'S DEATH, CEASES.

Under Code, art. 101, § 43, where a dependent widow of a deceased employee, awarded compensation, remarries at a time when she is "without dependent children," because a child dependent at the time of her husband's death had died, her compensation ceases.

(For other cases, see Master and Servantt, Dec. Dig. § 393.)

Appea' from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Proceedings by Josephine Giggndelle under the Workmen's Compensation Act for compensation for the death of her husband. the employee, opposed by the Piedmont & Georges Creek Coal Company, the employer, and the State Accident Fund. Compensation was awarded, and from an order of the State Industrial Accident Commission, terminating compensation as prayed after death of decedent's child and the remarriage of claimant widow; the latter appeals. Order affirmed.

Argued before Boyd, C. J., and Briscoe, Thomas, Pattison, Urner, Stockbridge, Adkins, and Offutt, JJ.

Frank A. Perdew and Albert A. Doub, both of Cumberland, for appellant.

Alexander Armstrong, Atty. Gen. (Allan H. Fisher, Asst. Atty. Gen., on the brief), for appellees.

ADKINS, J. The husband of the appellant, while engaged in an extrahazardous employment, was killed on June 9, 1917, leaving the appellant and an infant child as his dependents, both of whom were solely dependent upon him for support. The State Industrial Accident Commission awarded compensation at the rate of $12.57 per week, payable to the widow and infant for a period of 338 1-9 weeks, beginning as of June 9, 1917. The insurer was ordered to pay all the compensation to the widow, who was ordered to apply $3.57 of it to the use and benefit of the infant in such manner as to the mother should seem best for the welfare of the child. Later the insurer filed a petition, alleging that the infant died on October 30, 1918, and that the widow remarried on December 11, 1918, and that the amount required by the order of the commission to be paid on behalf of the child had been paid up to the date of its death, and that the amount apportioned to the widow had been paid up to the date of her remarriage. The petition prayed for a modification of the order to the effect that payments of compensation may be terminated as of the dates of the death of the child, and of the remarriage of the widow, respectively.

The commission, Wagaman, chairman, dissenting, ordered the compensation to be terminated as prayed. From this order an appeal was taken to the circuit court for Allegany county, and the case was heard by the court without a jury. Two prayers were offered by the appellee, one on the theory that all compensation on behalf of the infant should cease as of the date of its death, and the other on the theory that all compensation, both on behalf of the infant and widow, should cease as of the date

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of the remarriage of the widow. The court refused the first, and granted the second prayer, and ordered the insurer to pay the balance apportioned on behalf of the infant from the date of its death to the date of the marriage of the widow; all compensation to cease as of the latter date. The case comes up on an appeal by the claimant from this order; the insurer not appealing.

The sole question to be decided is the proper construction of section 43 article 101 of the Code, which is in part as follows:

"In case of the remarriage a dependent widow of a deceased employee without dependent children, all compensation under this article shall cease. * * *

Did the Legislature mean by the language above quoted that, on the remarriage of the widow without dependent children of the deceased husband living at the time of such remarriage, compensation should cease, or were the words "without dependent children" intended to refer back to the date of the death of the deceased? The respective interpretations of this language contended for are ably presented by the dissenting opinion of the chairman of the commission, and by the opinion of Judge Henderson, set out in full in the briefs of appellant and appellee, respectively. As a matter of grammatical construction both views are possible, although even from this point of view we think the conclusion reached by the circuit court is the sounder. Of course the legislative intent as gathered from the entire section, and from all parts of the act which throw light upon it, would be controlling even if the grammatical construction were doubtful. And we find no difficulty as to this in reaching the same conclusion as that arrived at by the circuit court.

We can see no reason why the compensation should cease on the remarriage of the widow when there were no children at the date of the death of the deceased husband, and not in the happening of the same event when there were dependent children at the death of the husband, but none at the time of the remarriage. On the death of the child the widow was entitled to the entire amount awarded because she was then the only dependent of her deceased husband, and not, as to any part of the award, because she had been the mother of the child. In other words, she was in exactly the same position in reference to the award as she would have been if she had been the only dependent at the time of the death of her husband. The amount of the award, when made, had no reference to the number of dependents, but to the character of the dependency.

The case of Adleman v. Ocean Accident & Guarantee Corporation, 130 Ml. 572, 101 Atl. 529, Ann. Cas. 1918B. 730 cited by appellant, has no bearing upon the question here involved. That was the case of the marriage of a dependent sister. The statute does not provide for the termination of payments in the event of the marriage of a dependent sister; while it does so provide in the event of the remarriage of a widow.

Order affirmed, with costs to appellee.

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CURTIS v. HAYES WHEEL CO. ET AL. (No. 63.)

(Supreme Court of Michigan. July 20, 1920.)

178 Northwestern Reporter, 675.

MASTER AND SERVANT—EMPLOYEE WHO BROKE LEG AND CONSEQUENTLY LOST FOOT ENTITLED TO COMPENSATION FOR 125 WEEKS.

Under Workmen's Compensation Act, §§ 9, 10, as amended by Pub. Acts 1919, No. 64, an employee who accidentally fractured his leg near the ankle, necessitating amputation of the foot, was entitled to recover under section 9, providing for compensation for total incapacity to work, until his foot was amputated, and thereafter his case was governed by section 10, specifically allowing for loss of a foot 60 per cent. of the average weekly wages for 125 weeks.

(For other cases, see Master and Servant, Dec. Dig. § 385[7].)

Certiorari to the Industrial Accident Board.

Proceedings for compensation under the Workmen's Compensation Act by Alonzo Curtis, the employee, opposed by the Hayes Wheel Company, the employer, and the Michigan Mutual Liability Company, the insurer. Compensation was awarded by the Industrial Accident Board, and to review its award the employer and insurer bring certiorari. Order of the Industrial Accident Board, allowing compensation for total disability, affirmed, order providing for an allowance after the expiration of a number of weeks reversed.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Beaumont, Smith & Harris, of Detroit, (Hal H. Smith and Albert E. Meder, both of Detroit, of counsel), for appellants.

Charles J. De Land, of Jackson, for appellee.

SHARPE, J. On September 7, 1916, while employed by the Hayes Wheel Company at its Jackson plant as a floor sweeper, the applicant, Alonzo Curtis, then 54 years of age, fell about 6 feet from a runway while pushing a load of sawdust. A fracture of his left leg near the ankle resulted, necessitating the amputation of his left foot between 4 and 5 inches below the knee joint, on October 20, 1916.

A compensation agreement, approved by the board, was entered into, providing for the payment of $6.49 per week for 125 weeks. It recited that the result of the accident was "fracture of right leg above ankle foot, amputated." Pursuant to said agreement, respondents paid applicant compensation for 125 weeks. In January, 1920, applicant filed a petition with the board alleging that as—

"a result of said injury and the improper care and medical attention given him by respondents, * * * he is now and always has been since the time of said accident unable to do manual labor, * * * and he believes the fact to be that he * * * always will be unable to perform manual labor of any kind; * * * that since said accident his health has been that he has not worked a single day, and is in fact a helpless invalid and sick man."

The board was asked to take such matter under consideration and adjudge him such further compensation as he was "in justice and in law entitled to." The respondents filed an answer denying any further liabili-

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ty. Despositions of the applicant and two physicians were taken, and the matter submitted to the board. On March 20, 1920, it found the facts as above stated and also:

"(c) That as a result of the operation for the amputation mentioned said applicant has suffered a contraction of the muscles behind the left knee, as well as a shock to his nervous system, and that because of this condition, which is the proximate result of the accident of September 7, 1916, said applicant has been totally incapacitated for work in the employment in which he was engaged when injured, viz. that of a common laborer, such total incapacity dating from the time of the accident, September 7, 1916, and being present on January 22, 1920, upon which date testimony was taken in the case.

"(d) That in addition to the compensation which he has already received, as for the loss of his left foot, viz. 125 weeks' $6.49 per week, said applicant should receive compensation computed as follows:

For total disability from the date of accident to the date of amputation of left foot, October 20, 1918, a period of 6 weeks, at $6.49 per week	$ 38 94
And for total disability from March 14, 1919, the end of the period covered by the 125 weeks above mentioned, to January 22, 1920, a period of 44⁴/₇ weeks, at $6.49 per week	$290 07
Making a total of	$329 01

And that subsequent to January 22, 1920, during the period his condition, as a result of the accident, remains as it was on said date, said applicant should continue to receive compensation as for total disability, and as for partial disability, should he become legally entitled to compensation as for partial disability, all in accordance with the provisions of the Workmen's Compensation Act."

—and awarded applicant compensation in accordance with such finding.

There was no proof supporting the claim of improper care and medical attention, except such inference as might be drawn from the present condition of the limb, and no finding relative thereto was made by the board.

The claim of the respondents is thus stated:

"That portion of the board's order granting compensation subsequent to the expiration of 125 weeks is illegal, because:

"(1) The agreement of October 26, 1916, is final and binding.

"(2) The act itself in this case allows only 125 weeks' compensation, plus the period from the accident to the date of amputation."

We will consider these claims in the inverse order in which they are stated.

1. Broadly speaking, the claim of the applicant is that the amputation resulted in a "contraction of the muscles behind the left knee," that such condition is the proximate result of the accident of September 7th, that it wholly incapacitated him from work, and that the allowance by the board as for total incapacity is warranted. This leads to a careful consideration of the several provisions of sections 9 and 10 of the act (sections 5439, 5440, 2 Comp. Laws 1915, as amended by Pub. Laws 1919, No. 64). Section 9 provides for compensation in cases where the incapacity for work is total. Applicant is entitled to recover under it until the time when his foot was amputated. Thereafter his claim comes under the provisions of section 10, which specifically allows "for the loss of a foot, sixty per centum of average weekly wages during one hundred and twenty-five weeks." As soon as the amputation was performed, he became disabled by the loss of his foot. He suffered no other injury than that which resulted in the amputation. As the act provides specific compensation for the loss of a foot, we are of the opinion that all liability of respondents ceased when payment was made for the full term of 125 weeks. These specific items

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of compensation fixed by the act must control when no other disability than such as results from the removal of the member exists. To hold otherwise would, so far as the employer is concerned, render this provision nugatory and of no effect. Should the employee recover from the effects of the amputation in a few weeks and be able to resume his employment, the payments secured to him on account thereof are in no way affected, but continue during the term fixed. To hold that when his recovery is not fully completed at the expiration of the stated term he may present a claim for further compensation under section 9 would give him an advantage not contemplated in the act. As before stated, the applicant is entitled to recover for total disability up to the time when his foot was removed, and, there being no claim of disablement other than that incident to such removal, payment for 125 weeks thereafter.

Our attention is called to the following language in the report of the commission appointed under Act No. 245 of the Public Acts of 1911 to to investigate and report a plan recommending legislative action to provide for compensation in such cases:

"Certainty in the amount of the compensation is of the greatest importance because any uncertainty whatever will multiply litigation. A defect of the British insurance act much criticized in Great Britain is that it does not in the end reduce litigation, but rather increases it because of the uncertainty of the amounts that are to be received under its schedules by the workman."

In so far as it seemed possible, the act makes the allowance certain. The degree and duration of the disability and the weekly earnings of the injured party must be determined as matters of fact by the board. When the disability is due to the lack of a member, the act relieves the board of determining its extent, and specifically fixes the period for which compensation shall be paid. Should the injured party be unable to resume his employment at the expiration of such period, he is but in the same condition as one who received an allowance for total disability, after the maximum amount provided therefor has been paid.

The conclusion reached is but that stated by Mr. Justice Steere in Addison v. W. E. Wood Co., 207 Mich. 319, 174 N. W. 149. We might have contended ourselves with deference to that decision, but the question here presented was not therein directly involved. The case of Limron v. Blair, 181 Mich. 76, 147 N. W. 546, relied on by counsel for applicant, is distinguished in the Addison Case. If it can be said to state a rule of construction at variance with the views herein expressed, it is to that extent overruled.

2. The conclusion reached renders it unnecessary to consider the other questions presented as to the binding character of the agreement.

The order of the Industrial Accident Board, allowing compensation for total disability from the date of the accident to the date of the amputation ($38.94), is affirmed. The order providing for an allowance after the expiration of the 125 weeks is reversed. The case is remanded for such further proceedings as may be necessary.

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ST. CLAIR v. A. H. MEYER MUSIC HOUSE et al. (No. 7.)

(Supreme Court of Michigan. July 20, 1920.)

178 Northwestern Reporter 705.

1. MASTER AND SERVANT—PREDISPOSITION BECAUSE OF DISEASE IMMATERIAL UNDER WORKMEN'S COMPENSATION ACT.

The fact that an applicant for compensation under the Workmen's Compensation Act for injury, consisting of a rupture of a blood vessel of the brain, was predisposed because of disease to this form of an attack, is immaterial, and has nothing to do with the question whether what befell him is to be regarded as an accident.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

2. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD TRIER OF FACTS UNDER WORKMEN'S COMPENSATION ACT.

The Industrial Accident Board is the trier of the facts in a proceeding under the Workmen's Compensation Act, and where there is evidence supporting a finding it will not be disturbed.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — FINDING THAT CEREBRAL HEMORRHAGE WAS RESULT OF ACCIDENT HELD SUSTAINED BY EVIDENCE.

In a proceeding under the Workmen's Compensation Act to obtain compensation for personal injuries, evidence *held* to warrant a finding by the Industrial Accident Board, that a rupture of a blood vessel of the brain was the result of an accident; rupture occuring when servant was lifting piano over the last step of a stairway, and there was unusual lifting and straining, exertion and apprehension, by reason of the lack of experienced help, resulting in the unusual.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Brooke, and Steere, JJ., dissenting.

Certiorari to Industrial Accident Board.

Proceeding by Clayton St. Clair under the Workmen's Compensation Act (Pub. Laws 1912 [Ex. Sess.] No. 10) to obtain compensation for personal injuries opposed by the A. H. Meyer Music House, the employer and the Travelers' Insurance Company, the insurer. There was and award of compensation by the Industrial Accidet Board, and the employer and insurance company bring certiorari. Award affirmed.

Argued before Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Vandeveer & Foster, of Detroit, for appellants.
Fred T. Miles. of Holland, for appellee.

CLARK, J. The respondent, A. H. Meyer Music House, a corporation, was engaged in the business of selling and delivering pianos and other musical instruments. Applicant having 35 years' experience in that business, was in its employ, and he and one other employee, Frank G. Swift, were directed to deliver a piano to a customer of said respondent.

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The piano was to be delivered to the second floor of a building, reached by a steep, narrow stairway of about 20 steps. The truck upon which the piano was carried was backed to the front of the building; the piano being upon a piano skid, which resembles a sled, the runners being polished to slide easily. To the front end of the skid a rope was attached, which looped from the front end of the right runner to the front end of the left runner. The rope was used in lifting. In going up the stairs, applicant was in front of the piano and Mr. Swift behind. Applicant was assisted by a lady who "was not very strong" and a man who "was very weak," both inexperiened in that work. A minister and a lady of the neighborhood, likewise inexperienced, attempted to assist Mr. Swift. With such assistance as they had, applicant lifting in front and Mr. Swift pushing behind, the piano was taken up the stairs step by step. When the last step was reached the piano was pulled and pushed forward until its center was over the last stair riser, when it was "broken over" to rest flat on the floor. Applicant testified that the last pull was the hardest, that the piano weighed about 900 pounds, and that just as he was making the last pull he felt something give way in his head. He immediately became ill. A physician was called, who found a rupture of a blood vessel, an artery, of the brain—cerebral hemorrhage—causing and resulting in paralysis of the left side. The physicians testified that the rupture of the blood vessel was due to high blood pressure, caused by the unusual exertion, the lift, sudden straining and that applicant's arteries were weakened by disease, arteriosclerosis. There was an award in favor of applicant, and it is here the sole contention of respondents, plaintiffs in certiorari, that there was no evidence of accidental injury arising out of and in the course of applicant's employment.

[1] The fact that applicant was predisposed because of disease to this form of attack is immaterial, and has nothing to do with the question whether what befell him is to be regarded as an accident or not. See La Veck v. Parke, Davis & Co., 190 Mich. at page 607, 157 N. W. 72, L. R. A. 1918D, 1277. Justice Stone, speaking for the court in Guthrie v. Detroit Shipbuilding Co., 200 Mich. at page 360, 167 N. W. at page 39, said:

"That an injury received by a workman while engaged in his usual work, without intervention of something unusual or fortuitous, is not an accident, is now so well established by our decisions that the proposition needs no discussion."

See, also, Schroetke v. Jackson-Church Co., 193 Mich. at page 622, 160 N. W. 383, L. R. A. 1917D, 64.

Bringing this case within the rule as above stated, the board found unusual and fortuitous circumstances:

"This applicant was lifting at a disadvantage. He was doing unusual work; in fact, two men were practically attempting to do the work which ordinarily required the efforts of four or five. They were working under unusual apprehension, on account of the lack of help and the inexperience of the women and men who were endeavoring to assist them. The injury occurred at a point where it was necessary to put forth the greatest effort, and at a time when apprehension of danger was evidently the greatest. * * * The applicant was called upon at this particular point to put forth unusual effort, under unusual and fortuitous circumstances, and the unusual happened."

[2] The board is the trier of the facts. If there is evidence supporting the finding of unusual and fortuitous circumstances above quoted, the award must be affirmed. Mr. Swift testified:

"Q. When you ordinarily deliver a piano upstairs, whether or not it is customary to take more than two experienced men to deliver the piano? A. Why, we usually do; yes.

"Q. How many do you usually have? A. We generally have four good strong men.

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"Q. Experienced? A. Four or five, yes, that know what to do.

"Q. And so far as you know Mr. St. Clair didn't know either that the piano was to be delivered upstairs Well, I don't know that he did; we might have talked it over when we got near there. I think he mentioned something about, when we got there, near there, he thought it would have to go upstairs.

"Q. What did you do when you got there? A. Well, when we first got there, we run the truck in as near as we could to the place. I think I backed up to the stoop, and we went to see the lady, Mrs. Block, told her we had her piano for her and wanted to deliver it, and then we commenced to investigate to see about getting some help. It was quite a job; so she said she knew of some people that would help us. There was a lady there named Mrs Strick. she got her husband over there. Then she says, 'I will go and call the dominie' of the Reformed Curch, I think; and so we got him, too. Finally we got started upstairs.

"Q. At the time you got started, did you have sufficient help? A. Why, no; I don't believe we did have sufficient help as we should have to get the piano up.

"Q. Why not? A. Well, Mr. Strick, the genleman who helped in front with Mrs. Block, he is a very weak man; he wasn't strong, and I didn't know that so much then as I did after we got up there.

"Q. Then you started to move the piano upstairs? A. Yes. When we started the first step, we have to lift that on, and when you get that same ways up, you shove it up until about an inch or so of the step; then they give it another raise, and when you raise it you give it another push, until you get it so it is on the incline of the stairway, get it level with the stairway.

"Q. Ordinarily you have more than one man working at the front end of the piano? A. Oh, yes; usually three.

"Q. And usually three? A. Three men.

"Q. And at that time you had practically Mr. St. Clair doing the work? A. Mr. St. Clair had to do the heft of the business, because there was one lady that wasn't very strong. Mrs. Block did what she could do, but couldn't do much, and Mr. Strick wasn't a strong man.

"Q. And Mr. St. Clair took and handled both ropes? A. Yes, sir; and they were doing as much as they could.

"Q. And they would have to stand back of Mr. St. Clair, wouldn't they? A. Yes.

"Q. Because there was not any room there? A. You see, when you would lift, it was narrow. the stairway wasn't wide enough to get to the sides, and you couldn't get in there; you had to stand in front of the piano, and then you got hold of the ropes and lifted.

"Q. All right; let us get to the top of the steps. A. When we got to the top step, we pushed, you see, then we pushed it; then we would have to be careful to get within an inch of the other, so, when we raised it again, it wouldn't catch under the stairway.

"Q. Well, practically, Mr. St. Clair was doing all that alone. because there wasn't room enough? A. They were doing what they could, but couldn't get in; but they did what they could.

"Q. Whether or not this condition was usual, or whether all this time Mr. St. Clair had to exert himself more than he ordinarily did? A. I think he had the hardest job than he had for a long time while he worked with me. that is my candid opinion; it was the hottest time of the day.

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"Q. Tell just what happened when you got to the top step? A. Well, when we got to the top step we shoved the piano into the room.

"Q. Before you shoved the piano in to the room?. A. Oh, you mean over the break? When you get to the last break, where you go over, you got to get all the strenghth you got, and hang it to raise it over; it is a heavy thing to do, and any one who ever handled them knows that; and it is the same in front, you have to lift in front to get it over after you get it started and get onto the end of the skid; then they help below, then they shove a little further and then all get up; that is the way we went, I know that. Hard job.

"Q. Now on this particular occasion was it a harder job than usual? A. Well, yes.

"Q. To get it over the top and make the break? A. Well, I tell you it was a good big job, because we didn't have the help we should have."

Applicant testified:

"Q.. Well, was there anything out of the ordinary, unusual, about that particular lift, anything different from any of the others? A. Well, I will tell you; no; nothing only in one way there is. another was there isn't. you never draw one up a stairway, but every minute you are uneasy about it until you get it to the landing; you are uneasy, afraid it is going to get away from you. * * *

"Q. Why was the last lift any different than the others then? A. Well, it is always a hard lift when you go up a stairway, the last step is hard one; you see, when you make the last raise, then you are lifting, in away you are lifting really the whole weight of the piano, simply because here in the piano, the back end is on the stairway. you have got to lift harder, really the whole thing, to make the last raise.

"Q. Well, was it any harder lift than the others? A. I think it is; I think it always is."

[3] Making what happened to applicant an accident within the meaning of the act,, the testimony quoted affords a basis for a finding of unusual and foutuitous circumstances, viz.: That applicant and Mr. Swift, with some inexperienced help, were doing work usually done by four or five experienced men; that applicant at the front of the piano was doing, nearly, if not quite, work usually done by three experienced men; that applicant's usual anxiety or apprehension that piano might fall was aggravated and made unusual by the lack of sufficient experienced help may be inferred; and that in making the last hard lift breaking the piano over the top of the stairs, there was unusual lifting and straining, exertion, and apprehension, resulting in the unusual—cerebral hemorrhage.

This view is supported by authority. Grove v. Michigan Paper Co., 184 Mich. 449, 151 N. W. 554; La Veck v. Parke, Davis & Co., supra; Schroetke v. Jackson-Church Co., supra; Robbins v. Original Gas Engine Co., 191 Mich. 122, 157 N. W. 437; Schanning v. Standard Casting Co., 203 Mich. 612, 169 N. W. 879; Crosby v. Thorp, Hawley & Co., 206 Mich. 252, 172 N. W. 535.

The award is affirmed.

Fellows, Stone, Bird, and Sharpe, JJ., concurred with Clark, J.

Brooke, J. I can find in the record no evidence of an accidental injury to claimant.

Steere, J., concurred with Brooke, J.

Moore, C. J., did not sit.

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VENUTO v. CARTER LAKE CLUB ET AL. (No. 21464.)

(Supreme Court of Nebraska. June 29, 1920.)

178 Northwestern Reporter, 760.

(Syllabus by the Court.)

1. MASTER AND SERVANT—EVIDENCE HELD TO ESTABLISH NONRESIDENT MOTHER'S DEPENDENCY WITHIN COMPENSATION LAW.

Evidence examined, and *held* to establish that an aged mother in poor circumstances, residing in Italy, whose children lived in this country, and to whom the deceased had been sending periodical sums of money from his wages for her support, was entitled to compensation as a dependent under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

2. MASTER AND SERVANT — COMPENSATION INSURER HELD ESTOPPED TO DENY LIABILITY FOR DEATH BEYOND STATE.

Where an insurer issues a policy to insure employees of a Nebraska corporation, which policy recites that it is issued under the Nebraska Workmen's Compensation Act, and the place of business or occupation is "south side of Carter Lake adjacent to Omaha, Neb., consisting of 55 acres more or less," and it accepts and retains the premium money, it is estopped to deny that it insured against accidents to employees of the corporation while at work upon the premises described, upon the plea that such premises were in the state of Iowa, and it did not insure against accidents not occurring within the state of Nebraska.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

Flansburg, J., dissenting.

Appeal from District Court, Douglas County; Wakeley, Judge.

Proceeding by Sofio Musco, as administrator, under the Workmen's Compensation Act, to recover for the death of Frank Musco, opposed by Carter Lake Club, employer, and the Georgia Casualty Company, insurer, wherein Antonio Venuto, the Italian vice consul, was substituted as plaintiff. From an adverse judgment plaintiff appeals. Reversed and remanded.

A. H. Bigelow, of Omaha, for appellant.

C. E. Herring and Brome & Ramsey, all of Omaha, for appellees.

LETTON, J. Frank Musco, a laborer, was killed by an accident arising out of and in the course of his employment with the Carter Lake Club, a Nebraska corporation. An action was brought against the club and the Georgia Casualty Company, the insurer, in the name of the administrator of the deceased, and afterwards the Italian vice consul was substituted as plaintiff in the petition, alleging that the only person dependent on deceased was his mother, an alien who resides in Italy.

The court found that under the evidence the claimant was not a dependent within the meaning of the Compensation Act, and reserved decision upon the other issues. Plaintiff appeals.

When Musco died he left a mother, stepfather, and two brothers surviving him. On January 26, 1916, and at other times, deceased purchased money orders in Omaha, payable to his mother, amounting in all to $101

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in United States money, receipts for which were introdued in evidence. The deceased was the only unmarried son. he was about 22 years of age when he was killed. The other two brothers lived in Omaha, are both married, and have children. One brother testifies that the mother lived in Certino, Italy; that he could not support her on account of having a family of his own to support. He testifies that her husband had left her years ago, that she was in need of assistance, and that he sent her a little money whenever he could, but he was very indefinite as to the intervals of time between remittances. It is admitted that the other brother will testify that he has not contributed anything to the support of the mother. A witness testified that Musco had procured him to write letters home inclosing the money orders, and that he had told the witness he had been supporting his mother; that her second husband did not do so; and that he was trying to save enough money to bring her to this country to keep house for him.

In Victor Chemical Works v. Industrial Board, 274 Ill. 11, 23, 113 N. E. 173, Ann. Cas. 1918B, 627, a brother of the deceased testified that the father and mother were living in Italy; that the deceased contributed to the support of the family prior to his death; that he had seen the receipt for a money order for $40, which the deceased showed to him. Another witness testified that he knew the deceased in Italy, and knew him when he arrived in this country; that he assisted him as interpreter in procuring a money order, which was sent to the father. Another witness testified to the same effect. "There was other evidence, consisting of declarations of the deceased at the time he sent the money to his father, and his purpose in sending it, and that his parents depended upon him for support, which was objected to, and which objections should have been sustained."

[1] After stating the necessity for competent and legal evidence the court held that there was sufficient competent evidence to sustain the finding of the industrial board that the deceased left parents, and that he had within 5 years contributed to their support. The evidence in the case at bar is stronger than the evidence in that case, even after disregarding the declarations of the deceased, which were incompetent as hearsay testimony. In Tirre v. Bush Terminal Co., 172 App. Div. 386, 158 N. Y. Supp. 883, it was held that the evidence as to dependency was insufficient, but the court intimated that the claimant daughter, who lived in New York, might be presumed to know if the mother was still living, and, if so, as to her financial circumstances, and since no explanation was made as to why she did not testify at the hearing, and the findings of dependency were based solely upon hearsay and insufficient testimony, the case was sent back to the commission, to the end that her testimony and that of any other witnesses might be taken as to the existence and dependency of the mother. We are satisfied that there is sufficient evidence in this record to justify a holding that the mother is dependent. The facts that the brother in Omaha had heard from her by letters at intervals for nearly 20 years, that it was a matter of family knowledge that the stepfather had deserted her, and that she was in poor circumstances, and the positive and undisputed evidence that the deceased and his brother had been sending her money at intervals for the purpose of her support, in connection with the fact that the brother testified that the deceased was not indebted to his mother, constitute, in the absence of any evidence to the contrary, sufficient reason to hold that the mother was dependent upon the deceased. The case does not fall within the rule that where the judgment of the trial court is based upon conflicting testimony, and there is sufficient competent evidence to sustain the verdict, it will not be disturbed unless clearly wrong, because the evidence here is undisputed, and part of it is documentary. We are of the opinion

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that the finding of the district court upon the issues of support and dependency should be set aside.

[2] The defense is made by the casualty company that the defendant was employed upon the grounds of the Carter Lake Club in the state of Iowa; that the Nebraska Workmen's Compensation Act (Laws 1913, c. 198) has no application; that the policy only covers losses under the Nebraska act, and it is not authorized to insure. and did not insure, injuries to employees under the Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147). This defense and the reply pleading estoppel were not passed upon by the trial court.

The question whether Workmen's Compensation Acts have extraterritorial operation is one as to which the courts are divided. The question very largely depends upon the construction given to the statute of each particular state. We find it unnecessary to now determine the question of extraterritoriality, and are the more reluctant to do so on account of the fact that this issue has been briefly argued only by the defendant casualty company. Neither in the petition nor in the answer of the employer is there any allegation that the deceased was employed to work in Iowa, or that he was injured in that state. No such issue is raised. So far as the answer of the employer is concerned, if the facts are established that the accident causing the death of Musco arose out of and in the course of his employment, and his mother was a dependent, the plaintiff is entitled to a judgment against the Carter Lake Club. Only in the answer of the casualty company is it alleged that the deceased was employed in Iowa and was killed in that state. A cross-petition against the casualty company and a reply to the answer of the casualty company were filed by the employer, and both in the cross-petition and in the reply facts are pleaded as constituting an estoppel against the casualty company to defend upon the ground that it is not liable because the policy was issued to indemnify against liability under the Nebraska act, and the injury occurred in Iowa. These facts, in substance, are as follows: That at the time the insurance was solicited, the club was a Nebraska corporation, with its principal place of business in Omaha, but operating a private club for corporate members, on the south side of Carter Lake adjacent to Omaha; that the insurance company maintained an agency in Omaha, and has been engaged in this state in soliciting and obtaining insurance risks under the Workmen's Compensation Law; that the casualty company issued its policy pursuant to the provisions of the laws of Nebraska, for which policy the club paid the premium demanded; that the policy was delivered, insuring against any loss arising under or by virtue of said act, from January 9, 1916, to January 9, 1917. A copy of the policy is attached. This recites the name of the club, its address, specifies the place where the occupation or business is to be carried on as "south side of Carter Lake adjacent to Omaha, Neb., consisting of 55 acres more or less," and the kind of trade, business, profession, or occupation as a "private club for various corporate members." "Estimated pay roll for the policy period" is named as $3,000, and "premium rate per $100 of pay roll" as $75.

The casualty company issued the policy and accepted and retained the premium to insure the club from liability for loss or damage to its employees while working upon the 55 acres of land lying upon the "south side of Carter Lake adjacent to Omaha, Neb." It is a geographical fact, of which the court is required to take judicial notice, that while the Missouri river constitutes in the main the boundary line between the states of Iowa and Nebraska, in occasional localities the river has changed its channel, and that the present boundary line now lies at varying distances to the west of the present channel. Carter Lake is in the environs of Omaha. The fact as to the location of the 55-acre tract on this side of the Missouri river must have been known to the agents of the casualty

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company. If it was not its intention to insure the employees upon this 55-acre tract, then the insurance company would be guilty of accepting a premium when it knew that no liability could accrue under this policy. Such a course of conduct cannot be upheld, and we are of the opinion that, having accepted the premium and issued the policy to insure the employees of the club, upon its grounds adjacent to Omaha, it cannot now claim that the policy is practically void and of no effect.

What has been said in this connection is really anticipatory and is based upon the allegations of the pleadings with the view of avoiding another appeal upon this point. For the foregoing reasons the judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

Aldrich, J., not sitting.

Flansburg, J., dissents.

MARTEL v. WHITE MILLS.

(Supreme Court of New Hampshire. Hillsborough. June 1, 1920.)

111 Atlantic Reporter, 237.

4. MASTER AND SERVANT—COMPENSATION ACT LIBERALLY CONSTRUED.

Laws 1911, c. 163, being remedial in its nature, should be liberally construed.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

Transferred from Superior Court, Hillsborough County. Marble, Judge.

Action for personal injuries under Laws of 1911, c. 163, by Wilfred Martel against the White Mills. The defendant was subjected to the above act, and had not accepted its provisions. Trial by jury, and verdict for the plaintiff. There was a view of the premises where the plaintiff was employed, and of the machine at rest and in motion upon which he was injured. Exceptions were taken by the defendants to the denial of their motions for a nonsuit and a directed verdict, to argument of counsel, and to the charge of the court. The facts appear in the opinion. Exceptions overruled.

Doyle & Doyle and Jeremiah J. Doyle, all of Nashua, for plaintiff.

Nathaniel E. Martin, of Concord, for defendant.

PLUMMER, J. The plaintiff's evidence tended to prove the following facts: The plaintiff was employed in the defendants' cotton mill to grind and repair their cards. He had been thus employed for a year and a half before his injury. The accident occurred on a dark, cloudy morning, a few minutes after 7, October 19, 1917.

When the plaintiff came to work that morning, the second hand informed him that a card was wet, and needed drying. The plaintiff immediately went to the card, and stopped it, and after going upstairs, and putting on his overalls, he returned to the card, and took out its feed roll (its cotton rolls already had been removed). He then started to go upstairs to obtain some whiting to use in drying the card, but on his way

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he remembered that there was no whiting, and went back to the card and took some waste, and rubbed it across the feed plate once or twice, when his fingers were caught, and drawn into the licker-in, and injured. When he started to wipe the feed plate he did not notice the card was running. He could have seen it was running if he had looked, but he had just stopped it, and supposed it was not in operation. There was a well-known and strictly enfored rule of the defendants that where a card was out of order, and was stopped to be repaired, no one should start it except the repair man. The card in question and the floor about it on the morning of the accident were wet, and it was plain to be seen that the machine was not in condition to operate. The room where the plaintiff was injured contained two rows of cards, 15 cards in a row.

When the plaintiff was at work about the card that morning before the accident, there were 2 employees working 2 or 3 cards beyond where the plaintiff was, at a distance of about 15 feet. One of these men by the name of Beelanger operated the row of 15 cards that included the card involved in the accident. The other employee operated the other row of cards, but they worked together in stripping the cards. Beelanger as he stood was facing, and in full view of the plaintiff, and the other operative was standing with his back to the plaintiff. Nine or 10 other employees, who were working in another part of the room, were not visible from the place where the accident occurred.

[1] If it could be found upon the plaintiff's evidence that the accident was caused by the negligent act of an employee of the defendants, this would establish their liability, unless it appeared "by a preponderance of evidence that the negligence of the plaintiff contributed" to cause the accident. Laws 1911, c. 163, § 2.

[2-4] It is claimed by the defendants that it could not be found that Beelanger or any other employee of the defendants started the card in the absence of the plaintiff. The evidence was that the card was not in operation when the plaintiff left the room; that it was running when he returned; that no one was in the room except the employees of the defendants; and that the card would not have started except by human aid. Therefore the jury would be amply justified in concluding that an employee started the card. The defendants say if an employee did negligently start the card after the plaintiff had stopped it for the purpose of repairs, he was transgressing a well-known and never violated rule of the defendants, and that in so doing he was not within the scope of his employment, and therefore the defendants would not be liable for his negligent act. If this position might be maintained at common law, it cannot be sustained under the above statute, which applies to this case. That act provides that if personal injury by accident arising out of and in the course of his employment, is caused to a workman by the negligence of a coemployee, the employer is liable. And if the employee in starting the card which the plaintiff had stopped was violating a rule of the defendants, he was nevertheless, under a liberal construction of the statute, their employee for whose negligence they were responsible. The statute (Laws 1911, c. 163) upon which this action is founded is remedial in its nature, and as such should and has received a liberal construction in this state. Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 Atl. 859, L. R. A. 1916A, 10, Ann. Cas. 1914D, 1280; Wheeler v. Contoocook Mills, 77 N. H. 551, 94 Atl. 265; Barber v. Jones Shoe Co., 108 Atl. 690.

The defendants contend that the plaintiff's contributory negligence precludes his recovery in this action; that his conduct in rubbing the feed plate with waste without observing that the card was running demonstrates his inexcusable carelessness.

[5] It cannot be held as a matter of law that the plaintiff was guilty of negligence unless the evidence so plainly and clearly establishes that fact that no reasonable man could come to any other conclusion. If the

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situation is such that ordinary men might differ in determining the question of the plaintiff's carlessness, it is the judgment of the jury that is required, and "the court cannot usurp the province of the jury, or decide as a matter of law what is plainly a question of fact." Demars v. Glen Mfg. Co., 67 N. H. 404, 406, 40 Atl. 902, 904; Roberts v. Railroad, 69 N. H 354, 45 Atl 94; Whitcher v. Boston & M. Railroad, 70 N. H. 242, 246, 46 Atl. 740; Minot v. Railroad, 74 N. H. 230, 234, 66 Atl. 825; Goodale v. York, 74 N. H. 454, 69 Atl. 525; Kelland v. Co., 75 N. H. 168, 170, 71 Atl. 947, Weeks v. Co., 78 N. H. 26, 30, 95 Atl. 658.

The cotton card upon which the plaintiff was injured was largely covered in, but the evidence tended to prove that there was a pulley at either end of the machine that was exposed to view, and there was an open space over the licker-in of an inch and a half. If one approaching the card noticed, he could tell if it were in operation, for he could see whether the pulleys and the licker-in were revolving. If the plaintiff when he first entered the room in the morning had met with the accident in question, his carelessness in not observing that the machine was in operation would have been inexcusable. The circumstances, however, that produced the accident were peculiar.

[6] The facts deducible from the evidence are that the plaintiff just previous to the accident stopped the card; that when he left it to obtain some waste it was at rest, and would have remained so if it had not been put in motion by some person;that he was absent for only minute or two; that he was fully aware of the well-known and inviolate rule of the defendants that no one should start the card, after he had stopped it for repairs, except himself, and the appearance of the card plainly indicated that it was out of repair, and the removal of the feed roll and the cotton rolls showed that it was not equipped for operation. The jury might well conclude under such conditions that the plaintiff was not guilty of negligence in failing to look and see if the machine were in operation before he began to rub the feed plate; that it was not unreasonable for him to assume that the card was at rest, and to commence his work upon it without thinking to notice whether it was in motion. "Precaution is a duty only so far as there is reason for apprehension." Shea v. Railroad, 69 N. H. 361, 364, 41 Atl. 774, 775.

The jury were warranted in finding that the plaintiff was not negligent in failing to perceive that the card was running, and that his supposition that it was not in operation, which was responsible for his failure to observe it, was justified. "Upon the question of the plaintiff's negligence, it may be, as said in Mitchell v. Railroad, 68 N. H. 96, 116, that 'reasonable and fair-minded men might differ; but it cannot be declared that no reasonable man could find as the jury did.' " Blood v. New Boston, 77 N. H. 464, 92 Atl. 954.

[7] Counsel for the plaintiff in argument said:

"Right down in Brother Martin's heart he knows that this plaintiff has told you absolutely the truth and that this defendant is liable in this cause of action."

Exception was taken by the defendants to this language. Previous to the making of the above statement plaintiff's counsel had called attention to the manner in which defendants' counsel had tried the case, claiming that his appearance and the way he conducted himself before the jury was evidence that he had no confidence in the defendant's case. If the conduct of counsel before the jury appeared to indicate that he had no confidence in the case, and we cannot say that it did not then it might properly be argued therefrom that he knew the plaintiff's evidence was true, and that the defendants were liable. And it was not exceptionable because it was stated directly as a fact. Lord v. Railway, 74 N. H 295, 67 Atl. 639; Kambour v. Railroad, 77 N. H. 33, 52, 86 Atl. 624, 45 L. R. A. (N. S.) 1188; Sanders v. Railroad, 77 N. H. 381, 384, 92 Atl. 546; Gross-

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bard v. Railway, 78 N. H. 496, 102 Atl. 534; State v. Small, 78 N. H. 525, 529, 102 Atl. 883. While argument of this character is not to be commended, it does not furnish a ground for disturbing the verdict.

The court in the charge instructed the jury that if the accident was due to the negligence of a fellow workman of the plaintiff, then the defendants would be liable, providing the plaintiff was free from fault. The defendants excepted, contending that the instruction relating to negligence should not have been general, referrig to any employee of the defendants, but should have been limited to the negligence of Beelanger.

[8] The defendants take the position that the plaintiff presented and tried his case solely upon the ground that the card was negligently started by Beelanger, and that this issue only should have been submitted to the jury. If a litigant presents to the jury one clear and distinct issue, and it is clearly apparent he relies upon no other claim, then the submission of any other issue would be error. Bjork v. Co., 79 N. H. ——, 111 Atl. ——; Gage v. Railroad, 77 N. H. 289, 296, 90 Atl. 855, L. R. A. 1915A, 363.

[9] In the plaintiff's declaration it is set forth in general terms that the plaintiff was injured by reason of the negligence of a fellow employee in starting the card upon which the accident occurred. The evidence introduced was not confined to proving that Beelanger was the only employee who could have started the card in the plaintiff's absence but it could be deduced from the testimony that it was done by Beelanger or his fellow employee who was working with him. The plaintiff's counsel in his opening and argument stated that Beelanger started the card. There are, however, general statements therein which indicate that the plaintiff did not intend to rest his right of recovery solely upon the negligent act of Beelanger, but upon the negligence of any employee of the defendants. A careful consideration of the case and the manner in which it was tried leads to the conclusion that the court did not err in declining to instruct the jury that they must find that the accident was caused by the negligent conduct of Beelanger, or return a verdict for the defendants.

Exceptions overruled.

All concurred.

COLUCCI v. EDISON PORTLAND CEMENT CO. (No. 40.)

(Court of Errors and Appeals of New Jersey. June 14, 1920.)

111 Atlantic Reporter, 4.

(Syllabus by the Court.)

MASTER AND SERVANT—DEATH OF SLEEPING EMPLOYEE HELD NOT AN ACCIDENT "ARISING IN COURSE OF EMPLOYMENT."

Where an employee during working hours stopped the work which he was employed to perform, left the place where he was employed to perform it, went 100 yards away into another building of his employer, deliberately lay down to sleep, and slept for three hours, until he was accidentally killed, *held*, that the accident did not arise in the course of his employment, within the meaning of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

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Appeal from Supreme Court.

Proceedings by James Colucci under the Workmen's Compensation Act to obtain compensation for the death of Leo Colucci, opposed by the Edison Portland Cement Company, employer. An award was affirmed on certiorari (108 Atl. 313), and the employer appeals. Reversed.

William H. Morrow, of Belvidere, for appellant.
George M. Shipman, of Belvidere, for respondent.

WHITE, J. This is an appeal from a judgment of the Supreme Court, affirming an award by the court of common pleas of Warren county of compensation under the Workmen's Compensation Act (P. L. 1911, p. 134) to the plaintiff for the death of his 21 year old son, Leo, upon whose wages plaintiff was proved to be partially dependent. The essential circumstances or facts, as established by the findings of the common pleas court and the undisputed testimony, were as follows:

Leo, a general utility laborer in defendant's cement works, had been at work before the accident (in accordance with his employment) in shoveling away broken rock or cinders, which spilled from a conveyer belt moving through an inclosed tunnel. The work was very trying, because of the dust and dirt and of the heat, and it was necessary for the men so employed to go out of their respective tunnels to seek fresh air and rest for a few minutes "now and then," re-entering the tunnel and resuming the shoveling, however, "in five or ten minutes," so as to prevent an accumulation of the spillings from clogging up the tunnel and stopping the running of the conveyer belt. Leo was working on the night shift, which commenced at 6 p. m. and ended at 7 a. m. Some time between 1:34 a. m. and 2:30 a. m. he left his tunnel and went to the dryer house of his employer's plant, about 100 yards away, which house he entered and lay down upon a pile of brick and went to sleep. His timecard in the company time clock was punched at 1:34 a. m., which, if he punched it, would indicate that he terminated his work for that night at that time. There was no evidence as to who punched this card, however, and the learned trial judge made no finding upon this point. At 3:45 a. m. the assistant foreman, Sabo, one of whose duties was to keep the men at their work, found Leo's conveyer clogged with an accumulation of spillings, went to look for him, found him sleeping in the dryer house, tried to awaken him, to get him to go back to his work, but was unsuccessful, and finally went himself and shoveled out the tunnel, so the conveyer could run. At about 5 a. m. Sabo found this tunnel clogged up, and again himself shoveled it out, and then at 5:30 a. m. went over to the dryer house and asked Jim, the fireman, if Leo was still asleep in there, and was told that he was, and said, "Come on; I wake him up, and you see some fun," or words to that effect, and took a brick (one witness thought it was an iron bolt) and climbed up some outside tower stairs alongside an adjoining building, and threw the brick down on the corrugated iron roof of the dryer house, so as to make a big noise and to shake the soot and "black stuff" down on the sleeping man, in order to give him a scare. This was within a few minutes of quitting time, and Sabo did not wait and tell Leo to get back to work, but ran down the stairs and slipped away, so that Leo would not see who it was that played the joke upon him. Sabo was asked on cross-examination if his purpose was not to get Leo back to work, but answered, "Well, it was about quitting time." Unfortunately there was a rusty hole or weak spot in the roof, and the brick struck and went through it, and hit Leo in the stomach, so that he died the next day.

Two questions are presented by these facts, namely: Did the accident arise out of the employment, and, if so, was it in the course of the employment? Both must be answered in the affirmative to warrant the

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award. Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458. Hulley v. Moosbrugger, 88 N. J. Law, 61, 95 Atl. 1007, L. R. A. 1916C, 1203. The learned common pleas judge resolved both these questions in the affirmative, but in this respect, so far as his decision was a conclusion of law from established-facts, it was subject to review in the Supreme Court, and the affirming judgment of that court is subject to review on appeal here. Bryant v. Fissell, supra; Hulley v. Moosbrugger, supra.

1. Did the accident arise out of the employment? This would ordinarily depend upon whether what the assistant foreman, Sabo, did at 5:30 in the morning, when he ascended the stairs outside another building and threw the brick on the iron roof under which Leo was sleeping, was reasonably within the scope of his employment to keep the men at their work, or whether it was a bit of "horse play," quite outside the confines of that employment. Hulley v. Moosbrugger, supra; Mountain Ice Co. v. McNeil, 91 N. J. Law, 528, 103 Atl. 184, L. R. A. 1918E, 494. The Supreme Court seems to have taken the view that, because Sabo as assistant foreman, was the immediate superior in authority over Leo, the doctrine of the foregoing cases does not apply. Without expressing any opinion upon this view in its application to cases where the accident occurred because the superior performed a duty which he was employed to perform in a way not reasonably contemplated by his employer, it seems to us quite clear that, where the act causing the injury was not only without the contemplated method of performance, but was also entirely outside the scope of the employment itself, the doctrine has full application, irrespective of the fact that the one who caused the injury was superior in authority within the employment to the one who was injured. We think, therefore, that if Sabo, in throwing the brick, was not doing it in order to get Leo to return to his work, but was doing it simply as what seemed an innocent joke, to scare him and to have some fun with him, quite apart from his return to work, whether before or after it was time to quit, it was in all essential respects like the "horse play" in Hulley v. Moosbrugger, supra. or the assault as a result of "horse play" in Mountain Ice Co. v. McNeil, supra. If this were all there was in the case, it might be necessary to send it back for an express finding of fact upon this point; but our view upon the second point involved renders this unnecessary.

2. Did the accident arise in the course of Leo's employment? Of course, if he deliberately stopped work and recorded himself as leaving at 1:34 a. m., as shown by the time clock, and departed about his own affairs, whether to go to sleep in his own bed at home, or on a pile of brick in the defendant's dryer house, or to do anything else he chose, there could be no recovery, for obviously the accident did not arise in the course of the employment. But, assuming that his card in the recording clock was punched through mistake or otherwise by some one else, and that what Leo actually did was not to terminate his shift hours of work, but was simply to stop his work, leave his place of work, go 100 yards away from it, and deliberately lie down to go to sleep; did the accident which caused his death three hours afterward, while he continued to sleep and without his having returned to his work, arise in the course of the employment? We think it did not. He had for the time abandoned his employment. It was not a case of an accident resulting from an employee unintentionally falling asleep while performing his work, as in Dixon x. Andrews, 91 N. J. Law, 373, 103 Atl. 410; but it was a case of an employee intentionally stopping and leaving his work and going 100 yards away and deliberately lying down and going to sleep, and remaining asleep away from his work during a period of 3 hours, during which time he was killed by the accident. It is true that Leo was probably very tired and sleepy. He had been off shift all the day preceding the night of the accident, but the night and day before that he had at his

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own request (he was paid by the hour) worked both the day and the night shifts in succession. But, no matter how good his reason for leaving his employment may have been, the controlling fact is that he did leave it, and that the accident to him occurred while he was deliberately away. It did not, therefore, arise in the course of his employment, within the meaning of the Workmen's Compensation Act.

The judgment is reversed.

McNUTT v. ADAMS EXPRESS CO.

(Court of Errors and Appeals of New Jersey. June 14, 1920.)

111 Atlantic Reporter 13.

(Syllabus by the Court.)

1. MASTER AND SERVANT—ESSENTIAL AVERMENTS AS TO APPLICABILITY OF COMPENSATION ACT TO BE PROVED.

In an action to recover damages for injuries, under section I of the Workmen's Compensation Act, the plaintiff must aver and prove, in order to avoid the application of section II of the act, that there was an agreement in writing, or a written notice given prior to the accident, that the employee's contract of hiring was not made subject to section II; otherwise all such contracts are to be presumed to have been made with reference to it.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Minturn, J., dissenting.

Appeal from Circuit Court, Camden County.

Proceedings under the Workmen's Compensation Act by A. Moulton McNutt, administrator, opposed by the Adams Express Company, employer. Judgment for complainant, and employer appeals. Reversed.

Joseph H. Gaskill, of Camden, for apellant.

Joseph Beck Tyler, of Camden, for respondent.

BERGEN, J. The plaintiff seeks to recover damages arising from the death of his intestate resulting from an accident while in the employ of the defendant, and rests his right on section I of our Workmen's Compensation Act (P. L. 1911, p. 134). He had a judgment, entered on the verdict of the jury, from which the defendant has appealed. The plaintiff in his complaint avers that the deceased was in the employ of the defendant; that it was a part of the decedent's duty as employee to assist in pulling a fire truck down an incline, in the ferry house at Camden, N. J., in case of fire alarm, and in preparation for such duty to take part in a fire drill whenever required; that in performing this duty, under the order of the defendant, he fell and suffered injuries which caused his death. The plaintiff proved sufficient facts to support these allegations. The answer of the defendant was a general denial of the averments in the complaint, except that deceased was in the employment of the defendant when the accident occurred which was admitted. At the opening of the case the defendant moved for permission to amend its answer by specifically averring that the contract of employment was subject to section II of our Workmen's Compensation Act, because there was no ex-

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press contract, or notice given, that the agreement of employment was not made with reference to the terms of section II of the act, but this the court denied. At the close of plaintiff's case the defendant moved for a nonsuit, and at the close of the entire case asked for a direction for the defendant, upon the ground that there was no proof to sustain the action under the first section of the act, upon which the plaintiff replied, urging that where there is no proof of an express contract, or of notice given which relieves the plaintiff from the effect of section II, the exclusive jurisdiction to determine the compensation to an employee for injuries arising out of and in the course of the employment was vested in the court of common pleas where the accident. the basis of the suit, happened. The statute has since been altered (P. L. 1918, p. 429) establishing the Workmen's Compensation Bureau, which was amended P. L. 1919, p. 200.

[1] The only question presented by this record is whether on July 24, 1917, the date of the injury of plaintiff's intestate, the plainitff, as administrator of the injured employee, can maintain an action under section I of the Workmen's Compensation Act without showing that his contract of employment is not governed by section II, because there was an express contract to the contrary, or that the required notice had been given. Section 9 of the Workmen's Compensation Act (P. L. 1911, p. 136) provides that—

"Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by a written notice from from either party to the other, that the provisions of section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby."

[2] Some testimony was taken upon the question of whether defendant should be allowed to amend its plea, and a witness testified that he had talked over the telephone with the claim agent of the defendant, who said that the defendant did not work under section II of the Workmen's Compensation Act. But this evidence was not introduced to sustain the issue, still if it had been, there is no proof that the person talking over the telephone had any authority to make any such statement, and, if he had, it took place long after the accident, and is not the contract or notice intended by the statute, for it was not expressed in any writing prior to the accident, or by a written notice. It is also urged by the plaintiff that a written receipt for wages, signed by the decedent, tended to show that his employment was casual. The receipt contained a notice that the employees of the company were not engaged for a particular length of time, and that the company reserved the right to terminate the service at pleasure; and the party executing the receipt agreed to accept the employment subject to being discharged at any time. There is nothing in this writing which indicates that the person who executed it accepted a casual employment, for under it the services might continue for an indefinite period. The trial court refused the nonsuit, or to direct. principally upon the ground that it was for the jury to say whether the employment was casual or not, and instructed the jury that if it was casual then the plaintiff could not recover. We fail to find in this case any evidence that would justify an inference that the employment was casual. When the plaintiff instituted his action he was subject to the statutory presumption that his intestate was, at the time of his death, working under a contract governed by section II of the Compensation Act, and could not recover under section I unless he was able to overcome that presumption by showing an express contract, or a notice, in writing made before the accident, that section II did not apply. And the fact that the defendant did not plead

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the want of these requisites does not help the plaintiff, because it is not necessary to plead a presumption of law. Bennington Iron Co. v. John Rutherford, Jr., 18 N. J. Law, 105, 35 Am. Dec. 528. The present case is substantially like that passed on by this court in Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 92 Atl. 354, in which Mr. Justice Trenchard says:

"Since the complaint does not aver that the contract contained any express statement, in writing, that section II of the act was not intended to apply, nor that any written notice to that effect was given, it is presumed that the parties accepted and were bound by the provisions of that section."

The effect of the case is that in an action by an employee for injuries suffered in the course of, and growing out of his employment, he must aver, if he wishes to avoid the application of section II of the Workmen's Compensation Act, an agreement in writing, or a written notice given, such as is required by the statute, and what he was bound to aver as a cause of action he must prove, and if he fails in this he has not made out his right to recover. Not having done that in this case, defendant was entitled to a direction in its favor, and therefore the refusal to accede to the defendant's request was an error for which this judgment must be reversed; and it is so ordered.

Minturn, J., dissenting.

RANDOLPH v. HAMMERSLEY MFG. CO. (No. 42.)

(Court of Errors and Appeals of New Jersey. June 14, 1920.)

111 Atlantic Reporter 15.

(Syllabus by the Court.)

1. MASTER AND SERVANT—AGREEMENT TO PAY COMPENSATION HELD NOT SUPPORTED BY EVIDENCE.

This suit was brought under the Workmen's Compensation Act, alleging in the complaint an agreement to pay compensation for the injury, within one year after the accident, as provided by the statute *held*, there was no evidence from which such an agreement could be inferred. The payments of wages and the doctor's bill alone is not sufficient from which such an implied agreement can be inferred.

(For other cases, see Master and Servant, Dec. Dig. § 405[3].)

2. CASES DISTINGUISHED.

The cases of Holzapfel v. Hoboken Mfrs. R. Co., 92 N. J. Law, 193, 104 Atl. 209; O'Brien v. Scandinavian-American Line, 109 Atl. 517, decided March 1, 1920. Dupont v. Spocidio, 90 N. J. Law, 438, 101 Atl. 407, distinguished.

Appeal from Supreme Court.

Suit by Earle F. Randolph against the Hammersley Manufacturing Company. Verdict was directed for defendant, and plaintiff appeals. Affirmed.

Collins & Corbin, Geo. S. Hobart, and Edward A. Markley, all of Jersey City, and Harry Weinberger, of Passaic, for appellant.

Clarence B. Tippett, of New York City, for respondent.

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PER CURIAM. [1, 2] This suit was commenced on December 23, 1919. The complaint alleged an injury to the plaintiff caused by an accident on August 21, 1914. The accident arose out of and in the course of the employment of the plaintiff by the defendant. The basis of the complaint is an allegation that the plaintiff and the defendant entered into an agreement providing for the payment of compensation by the defendant to the plaintiff, for such injury, under and by virtue of the provisions of the Workmen's Compensation Act (P. L. 1911, p. 134). The trial court directed a verdict for the defendant on the ground that the testimony showed there was no agreement on the part of the defendant to pay the plaintiff anything. This is the sole ground of appeal. The plaintiff testified:

"Q. Now, did you ever make a request or demand upon the company for compensation? A. No, sir."

The president and treasurer of the defendant company testified to the same effect. We are unable to find any evidence in the record that would justify even an inference that the parties had agreed upon any compensation for the injury. This, in our view, disposes of the question involved in this appeal, with the result that it was not error for the trial court to direct a verdict for the defendant. The argument of the appellant, however, is: The plaintiff was injured on August 21, 1914; he returned to work on May 1, 1915, and continued to work until December 31, 1915; he received during this time from the defendant, with the exception of a month, when he went on a vacation, his salary of $125 per month. The defendant also paid the doctor's bills. The plaintiff had at no time entered into agreement not to be bound by the terms of the Workmen's Compensation Act. See McNutt v. Adams Express Co., 111 Atl. 13, decided March term 1920. An express agreement is not relied upon. But it is urged that it was a question for the jury to say under this evidence and the inferences to be drawn therefrom whether the the plaintiff had established the implied agreement upon which the suit was based. It is further urged that under the cases of Holzapfel v. Hoboken Mfrs. R. Co., 92 N. J. Law, 193, 104 Atl. 209, and O'Brien v. Scandinavian-American Line No. 32, 109 Atl. 517, decided March 1, 1920, this suit can be maintained. But those cases are not an authority for any such position. In each of those cases there was a definite contract, identical in form, entered into in writing, in terms distinct and clear. The contracts provided for specific compensation under the statute. The actions were for liquidated damages only. It was held that under the contracts in those cases they could be enforced by common-law action. The common-law courts had power to entertain suit for arrears for liquidated installments due under the contract. That is not this case. The case of Du Pont v. Spocidio, 90 N. J. Law, 438, 101 Atl. 407, in the Supreme Court, simply held that there was evidence justifying the finding by the trial judge that there was an agreement for compensation, and when such agreement was in fact made it relieves the claimant of the obligation to bring his suit within one year after the injury. A petition filed after one year from the date of the injury in the court of common pleas was sustained, because of the agreement.

The judgment of the Supreme Court will be affirmed.

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ROTH v. ADIRONDACK CO.

(New York Supreme Court, Appellate Division, Second Department July 27, 1920.)

183 New York Supplement 717.

MASTER AND SERVANT — INJURY TO WAITRESS BY EMPLOYER'S DRIVER HELD OUTSIDE OF HER EMPLOYMENT, AND NOT GOVERNED BY FELLOW SERVANT RULE.

Where the contract of employment entitled a waitress to ride free in her employer's hotel bus when she was on personal errands during her off hours, and she was injured by the negligence of the chauffeur while returning with him to report for duty, such injury did not arise in her employment, so as to make her and the chauffeur fellow servants, and require her to proceed under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. §§ 194, 375[1].)

Appeal from Trial Court, Kings County.

Action by Rose Roth against the Adirondack Company. From a judgment for plaintiff, entered in the office of the clerk of Kings county, on a verdict for damages for personal injuries, and from an order denying defendant's motion for new trial, defendant appeals. Judgment and order affirmed.

Argued before Jenks, P. J., and Rich, Putnam, Blackmar, and Kelly JJ.

Edward P. Mowton, of New York City (William M. Wherry, Jr., of New York City, on the brief), for appellant.

Samuel Greenbaum, of New York City, for respondent.

KELLY, J. The appellant argues that at the time of the accident the plaintiff was its employee, engaged in its service; that the negligence of the driver of the automobile in which she was riding was the negligence of a fellow servant, for which defendant was not liable; and that the plaintiff must seek compensation for her injuries from State Industrial Commission under the Workmen's Compensation Law (Consol. Laws, c. 67.)

We think that on the evidence in this case the plaintiff was not engaged in the work of the defendant at the time of the accident, and that the driver of the automobile was not her fellow servant. Under her contract of employment she was engaged as a waitress at the White Face Inn, and her hours of work and the labor which she was engaged to perform were specified. She slept in a dormitory upon the hotel grounds. She reported for duty at 7 o'clock in the morning. Her work was in the dining room of the hotel. Before the dining room doors opened for breakfast, she swept, dusted, filled the water bottles, and prepared the tables to which she was assigned. The doors opened at 8 o'clock, and she waited upon the guests until the dining room closed at half past 9, when she cleaned up, changed the table linen, and did whatever side work was necessary, and was through at 10 o'clock. She testifies, and there is no contradiction, that from 10 o'clock until noon she was on her own time. She went to her room, went out for a walk, or followed her own inclination, doing no work for the defendant until noon, when she again reported for lunch in the house dining-room. She says: "Once out of the dining room, I was through until lunch time." Her lunch occupied her from 20 minutes to half an hour. She then went over to the hotel

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and repeated her preparation of the tables until the doors opened and the guests came in at 1 o'clock. She waited on the tables until the guests' lunch was over. The dining room doors closed at 2 o'clock. Sometimes her work was completed at 2 o'clock; approximately she was through by a quarter after 2. She was not required to report for work again until 6 o'clock in the evening for dinner. From the time she left the dining room after lunch she did no work in the dining room or in any part of the hotel, and she was never requested to do any work. Her time was her her own up to 6 o'clock.

When she was employed, she was promised $18 a month, with room and board, and in addition the defendant agreed that if, during her off hours, she desired to visit the neighboring village of Lake Placid, she would be given free transportation upon the hotel bus, running regularly, for the convenience of the guests, between the hotel and the railroad station in the village. She was required to obtain a pass or ticket at the hotel office, which she surrendered to the chauffeur operating the defendant's bus. He testified that every one riding on the bus must pay fare, have the ride charged at the hotel office, or produce a pass. He said: "The help had to [pay] if they didn't have a pass, and the guests."

On the afternoon of the accident, having completed her work at 2 o'clock, and being off duty until 6, she desired to do some personal shopping in the village, and applied for and obtained a bus pass. She entered the bus with four other waitresses. The wife of the manager of the hotel was also a passenger. The bus was on one of its regular trips to the railroad station. She rode to the village, where she alighted with the other passengers; the bus going on to the station in charge of the chauffeur with the hotel porter to meet an incoming train. On its return from the railroad station, the plaintiff and her companions boarded the bus in the village, and it proceeded towards the hotel, some three miles away. This was between half past 3 and 4 o'clock in the afternoon. In the ordinary course the plaintiff would have reached her dormitory about 4 o'clock, leaving her about two hours' free time before she was obliged to report for duty. Between the village and the hotel the bus turned over, and the plaintiff received injuries for which she has recovered a verdict, upon her allegation that they were occasioned by negligence on the part of defendant and without fault on her own part. There was evidence justifying a finding by the jury that the accident was occasioned by the carelessness of the chauffeur in driving the bus on the return trip.

Upon the evidence in the case I think that, while it is true that plaintiff was hired by the month, and in one sense continued in defendant's employment wherever she might be, still at the time of the accident she was not engaged in defendant's work, and she was not a fellow servant with the driver of the hotel bus. Her shopping trip to the village was no part of her duty as defendant's employee. Her time was her own. In pursuance of its contract the defendant was transporting her between the village and the hotel. She was free to go to Lake Placid village to shop, or to stay in her own room, as she saw fit. When she decided to go to the village, the defendant was rendering her a service which it agreed to perform for her. The defendant did not pay her to ride in the bus; on the contrary she paid defendant for the ride. It was part of the consideration for her service. She was traveling for her own purposes, and and the right of defendant to her services was suspended. She was not going to work. She had two hours after the return of the bus in which her time was her own.

In Matter of Daly v. Bates & Roberts, 224 N. Y. 126, 120 N. E. 118, the claimant was a laundress employed in a hotel in New York City. Her hours were from 7:15 a. m. to 5 or 5:30 p. m. She received as wages, money, board, and lodging, and after regular hours she had the privilege of using the laundry to do her own laundry work. On the day of her ac-

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cident she finished her work in the laundry about 4:30 p. m., and during the evening, while engaged in the laundry doing her own work, she injured her wrist. The State Industrial Commission held that the injury arose out of and in the course of her employment, and their award was affirmed by this court in the third department. But this Court of Appeals reversed the order, holding that the injury did not arise from or in the course of her employment, that her employment as laundress was to be performed within established hours. and that at the time of the accident she had completed her labors for her employer, and her duty to her employer did not require her presence in the laundry until the following morning. Judge Hogan, writing for the court, says:

"The accident occurred in the evening while she was engaged in doing work personal to herself. At that time she was not engaged in the performance of any duty she was employed to perform, or directly connected with or incidental to the work of the employer; but her labor there was entirely disassociated with the work of her employer. The fact that she was permitted to use the laundry for her personal benefit did not change the relation of the parties. Brienen v. Wisconsin Public Service Comm., 166 Wis. 24, 163 N. W. 182. Had the claimant remained in her room in the hotel and engaged her time in mending her clothing, and while so engaged met with an accident by reason of using a scissors, it could scarcely be held that such injury would arise out of and in the course of her employment, or was incidental thereto. Matter of De Filippis, 170 App. Div. 153, 155 N. Y. Supp. 761, affirmed 219 N. Y. 581, 114 N. E. 1064. Hallett's Case (May 28, 1918), 230 Mass. 326, 119 N. E. 673; Griffith v. Robbins (Court of Appeal, England, December 14, 1916) 10 Butterworth's Workmen's Compensation Cases, 92. In the latter case a girl employed as a parlor maid was sitting in the kitchen, occupying her spare time in mending a rent in her dress. Hearing a bell rung by her mistress, she left the darning needle in her dress and went to answer the bell. In walking to the door she managed in some way to drive the needle into her knee, breaking it off short, causing her serious injury. An award was made in her favor, which was reversed by the Court of Appeal of England, and it was there held there was no evidence to show that the injury was due to any risk incidental to her employment and that the accident did not arise out of her employment."

The applicant in the case at bar cites Matter of Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554, and Vick v. N. Y. C. & H. R. R R. Co., 95 N. Y. 267, 47 Am. Rep. 36, cases where an employer provided vehicles, an automobile in one case and a railroad train in the other, for the specific purpose of carrying workmen to and from the place of employment in order to secure their services. I do not think either of the cases affects the plaintiff's right to recover in the present case. The transportation in the cases cited was part and parcel of the work itself. Indeed, Judge Pound says in Matter of Littler v. Fuller Co., supra:

"The day's work began when he [claimant] entered the automobile truck in the morning and ended when he left it in the evening. * * * The case should be different if at the time of the accident claimant had been on the railroad train on his way to or from Great Neck" (the station at which the automobile received and delivered the workmen).

A case similar to the one at bar is Pierson v. Interborough Rapid Transit Co., 184 App. Div. 678, 172 N. Y. Supp. 492, where the plaintiff, an elevated railroad guard having been on duty for some hours, had two hours off. His time was at his disposal for that period. He was in uniform, but, instead of leaving the train, he remained on board, intending to visit his dentist, but also with the intention of stopping off to collect his pay. There was a collision, in which he was injured. Judge Shearn, writing for a unanimous court, and citing the Daly Case, supra, held that he was "off duty"; that the injury was not received while he was doing

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the duty he was employed to perform, nor was it a natural incident of the work. The court decided that plaintiff was not relegated to the Workmen's Compensation Act.

It seems to me that these considerations dispose of the additional claim of appellant that the injury was occasioned by the negligence of a fellow servant, for which defendant was not responsible. The fellow servant rule applies to servants of a common master co-operating or engaged in a particular work. I can find no such relation between the plaintiff and the chauffeur. In my opinion, the plaintiff was not working for the common employer at the tme of the accident. O'Bierne v. Stafford, 87 Conn. 354, 87 Atl. 743, 46 L. R. A. (N. S.) 1183.

I recommend affirmance of the judgment and order appealed from, with costs. All concur.

BEGENDORF v. SWIFT & CO., INC.

(New York Supreme Court, Appellate Division, Third Department. September 8, 1920.)

183 New York Supplement 917.

1. MASTER AND SERVANT—COMPENSATION MAY BE BASED ON TIPS.

Employees, receiving tips from third parties, are entitled to have such tips considered in determining the amount of their awards under the Workmen's Compensation Law, provided the employers contemplate that employees should receive such gratuities.

(For other cases, see Master and servant, Dec. Dig. § 385[1].)

2. MASTER AND SERVANT — COMPENSATION HELD IMPROPER BECAUSE BASED ON TIPS RECEIVED WITHOUT EMPLOYER'S KNOWLEDGE.

Where a truck driver employed to deliver meat received tips from customers without the knowledge of the employer. the amount so received should not be considered in fixing amount of compensation under the Workmen's Compensation Law, in the absence of evidence of a custom to give tips to persons so employed.

(For other cases, see Master and servant, Dec. Dig. § 385[1].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Benjamin Begendorf for compensation for injuries, opposed by Swift & Co., Incorporated, employer and self-insurer. Award for claimant by State Industrial Commission, and the employer and self-insurer appeals. Award reversed, and matter remitted to commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Lewis A. Ackley, of New York City (William H. Hartley, of New York City, of counsel), for appellant.

Charles D. Newton, Atty Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

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COCHRANE, J. The claimant, who was receiving $25 a week as compensation from his employer, also received on an average $5 per week as tips from the customers of the latter. The question is whether such tips should be taken into consideration in fixing the amount of compensation. He was a truck driver, and delivered meat for the employer, a corporation engaged in the meat business. The tips were received by him when making deliveries of meat to the customers of the employer. It is admitted that the employer had no knowledge of these gratuities.

[1] Pullman porters, restaurant waiters, taxicab drivers, and others receiving tips from third parties are entitled to have such tips considered in determining the amount of their awards for injuries under the Workmen's Compensation Law (Consol. Laws, c. 67), providing the employers in such cases contemplate and intend that their employees shall receive such gratuities. In such cases the compensation paid by the employers is correspondingly less, and they are therefore benefited by such gratuities. That was the theory of the decisions in Matter of Bryant v. Pullman Co., 188 App. Div. 311, 177 N. Y. Supp. 488, affirmed 228 N. Y. 579, 127 N. E. 909, and Matter of Sloat v. Rochester Taxicab Co, 177 App. Div. 57, 163 N. Y. Supp. 904, affirmed 221 N. Y. 491, 116 N. E. 1076. The case is different when an employee secretly receives gratuities from outside parties, not within the knowledge or contemplation of his employer.

[2] If the claimant in this case performed services for the customers of the employer for which he was not paid by the latter, he was doing something outside of his employment, and compensation or gratuities received by him therefor without the knowledeg of the employer cannot be made the basis of compensation. There is no evidence of custom to give tips to persons engaged in such business as the claimant. If there was such a custom, no one knew it better than he, and he makes no such claim. Secret compensation from third parties to an employee under the circumstances here disclosed is not consistent with his loyalty to his employer and is not commendable, and certainly should not be rewarded at the expense of the employer, by increased compensation for injuries.

The award should be reversed, and the matter remitted to the commission. All concur, except

JOHN M. KELLOGG, P. J. (dissenting). The only question here is whether the claimant, who was receiving $25 a week from his employer, can have his compensation increased because he was receiving tips averaging $5 per week. We held in Sloat v. Rochester Taxicab Co., 177 App. Div. 57, 163 N. Y. Supplement. 904 affirmed by the Court of Appeals 221 N. Y. 491 116, N. E. 1076, that tips received by a taxicab driver may be treated as a part of the wages where the employer and employee both understood that tips were to be received and retained by the employee. Substantially the same result was reached in Bryant v. Pullman Co., 188 App. Div. 311, 177 N. Y. Supp. 488, recently affirmed without opinion by the Court of Appeals. This case, in my judgment falls within the rule of the above cases.

The claimant was driving a delivery wagon which carried meat from packing house to packing house, and ussually drew a load a day from the packing house to retail dealers. The retail dealers, especially in very hot weather, would desire him to assist in hanging up the meat and caring for it after it was delivered at the shop, and for performing this service they frequently gave him tips. He concedes that his superior and the officials who employed him, did not know he was receiving tips, and that nothing was said about tips when the employment was entered upon some years before. Originally the wages were $18 per week, which was gradually increased, until at the time of the accident he was receiving $25 a week from the company. The stable foreman, who employed him for the company, and who appear-

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ed for the company upon the hearing, testified that he did not know that the drivers received tips, because he never went among them to inquire. He was then asked:

"Q. Isn't it a common thing for people who get service of a driver of a truck to give him tips, if he does them some favors? A. Well, I suppose there might be tips that way. Of course, that I don't know. Q. Is there any objection to his taking a tip, if anybody offers it to him? A. No, sir. Q. Suppose he were delivering meat to a butcher, and the butcher asked him to put it up in the ice box, 'for which,' he says, 'I will give you a half a dollar.' Any objection to his doing that? A. No, sir."

The company did not give very satisfactory evidence as to the custom in the trade as to giving tips to drivers. Under the evidence I think it was a fair question of fact whether the employer permitted him to perform extra service for which he would receive tips; the company deeming it for its benefit to have its customers satisfactorily served. The commission was justified in concluding that the company was willing to have the service performed and the customer pay its employee therefor.

We are not holding that unexpected tips, received by an employee without right, without the knowledge or consent of the employer, may be used to increase the wages as a basis for compensation. We consider that this case presented a simple question of fact whether the tips were received for extra service done for the benefit of the employer and with its consent, express or implied, which resulted in increasing the wages its employee was receiving for his service. The statute is to be liberally construed for the employee; the facts and the inference to be drawn rest solely with the commission. We cannot say that its determination of this fact is without some evidence to sustain it.

The award should therefore be affirmed.

FOSKET v. A. J. BUSCHMANN CO. et al.

(New York Supreme Court, Appellate Division, Third Department. September 8, 1920.)

183 New York Supplement 919

MASTER AND SERVANT—COMPENSATION CLAIMANTS HELD NOT SHOWN TO BE DEPENDENTS.

In a proceeding under the Workmen's Compensation Law to obtain compensation for death, evidence *held* insufficient to support the finding of dependency on the part of the mother and an infant brother of the decedent, who paid the mother $15 per week.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Cochrane, J., and John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding by Margaret Fosket under the Workmen's Compensation Law to obtain compensation for the death of her son, Robert J. Fosket, opposed by the A. J. Buschmann Company, the employer, and the Ætna Life Insurance Company, insurance carrier. There was an award of compensation, and the employer and insurance carrier appeal. Award reversed, and claim dismissed.

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Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

James B. Henney, of New York City (William H. Foster, of Syracuse, of counsel), for appellants.

Charles D. Newton. Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. Robert J. Fosket, aged 24 years, received injuries from which he died almost immediately while employed by A. J. Buschmann Company, electrical contractors, on the 23d day of December 1919. No questions relating to liability for the injuries arise upon this appeal. The only questions relate to the dependency of the mother and an infant brother of the deceased, to whom the State Industrial Commission has made awards.

The decedent left him surviving no wife or children under the age of 18 years, and in order to make any distributions for death benefits, outside of the funeral expenses, it is necessary to find brothers and sisters under the age of 18 years who were "dependent upon the deceased at the time of the accident," or a parent or parents, or grandparents, who were "dependent upon him at the time of the accident" (Workmen's Compensation Law [Consol. Laws, c. 67] § 16, subd. 4), and the State Industrial Commission, by its order, has discovered such persons in the mother of the decedent and a brother 14 years of age, while a sister of 16 years of age, apparently in the same position as the minor brother, is excluded from the award.

The employer and the insurance carrier appeal from this award and urge that the evidence, under the rules laid down by this court, does not show the dependency of the persons named. The record in this case consists of the sworn statement of the claimant, Margaret Fosket, in so far as the evidence of dependency is concerned, and is as follows:

"I am the mother of the deceased, Robert Fosket, who met his death on December 23, 1919, while in the employ of A. J. Buschmann Company, employed there as an electrician, by being electrocuted while working at the Astoria Mahogany Company, at the foot of Blackwell street, Long Island City. The deceased was single and gave me $15 per week for board, lodging, and washing, and he bought and paid for his clothes, but did not contribute anything further than $15 per week which he paid for board, lodging, and washing. The deceased's father is alive, and is employed as a letter carrier in the post office, earning $1,500 per year. Deceased also left a brother who is 28 years of age, and who livess with me and pays me $10 per week for board, lodging, and washing. This brother is contemplating being married, and of late has not given me this $10 per week as I agreed to let him have it in order to prepare for his marriage. I have also two younger children, one 14 and the other 16 years of age, and they both attend school."

She testified that George, the 28 years old brother, stopped paying his $10 per week in November prior to the death of Robert in December, and that he had not since resumed such payments, though living with his mother. Of course there is no legal liability on the part of the mother, as there was not on the part of Robert to support George. He was 28 years of age, and presumably able to care for himself, and the fact that the mother waived the payment of board does not tend in any manner to show dependency on her part. George does not have to be boarded, lodged, or otherwise cared for, and the claimant's husband draws $1,500 per year and owes the legal duty of supporting his wife and minor children. There is no evidence that he is not able to do this; the fact that boarding and caring for George

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gratuitously increases the family expenses beyond the apparent income does not constitute dependency on the part of the claimant and her infant son. So far as the record discloses, when Robert was at home paying $15 per week the table costs of the family, including George, aggregated $25 or $30 per week, and the husband was contributing $54 twice a month, out of which the claimant says she paid all of his expenses. It is not claimed that Robert was contributing gratuitously to the family; he was paying $15 per week for board, lodging, and washing," but "did not contribute anything further than $15 per week, which he paid for board, lodging, and washing." It may be assumed that this was a liberal payment in an humble family for board, lodging, and washing, but it is not pretended that it was a gift; it was a payment from a man 24 years of age for board, lodging, washing, and while it probably resulted in some degree of profit, it is not shown to have been the result of dependency on the part of the mother. There is no reason to suppose that she would stand in need of any of the ordinary comforts and conveniences of her station in life if Robert had lived with some other family and had not paid anything into the funds of the household.

Unless this court has been wrong in the cases of Pifumer v. Rheinstein & Haas, Inc., 187 App. Div. 821, 175 N. Y. Supp. 848, Frey v. McLoughlin Bros., Inc., 187 App. Div. 824, 175 N. Y. Supp. 873 and Mulraney v. Brooklyn Rapid Transit Co., 190 App. Div. 774, 180 N. Y. Supp. 654, and the case upon which these have been predicated, the award in this case cannot stand. There is no evidence to support the alleged dependency of the mother and infant brother of the decedent. The award should be revesed.

Award reversed, and claim dismissed.

Henry T. Kellogg and Kiley, JJ., concur.

Cochrane, J. (dissenting). At the time of the death of Robert J. Fosket he was 24 years old and was living with his parents. The other members of the family consisted of an older brother and a younger sister and brother ,aged 16 and 14 years, respectively, who were attending school. Robert had been paying to his mother $15 weekly. From her husband, who was a letter carrier, she received $54 twice a month. That was the only income of the family. With it she paid all household expenses, performing herself all the household service, including substantially all the laundry work. The oldest son was about to be married and leave home, and was retaining with a view to that event all of his earnings, contributing nothing to the family. The mother testifies that she paid $29 a month for house rent, and that the table supplies for the family of six cost from $25 to $30 a week. If a deduction of one-third be made from this last item, which would be the proportionate share of that item chargeable to the deceased son and to the son who was about to marry and leave home, it follows that the $108 a month contributed by the claimant's husband to the family expenses would about pay the rent and table supplies for the family of four, leaving nothing for clothing, fuel, and incidental expenses. In corroboration of this conclusion, the claimant testified that since the death of Robert she had been obliged to use $100 which prior to that time she had saved. That saving represents the entire property of the family, except that her husband may perhaps have a $50 Liberty Bond. I think it cannot be said that there is no evidence of dependency.

John M. Kellogg, P. J., concurs.

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FINKLEDAY v. HENRY HEIDE, INC. et al.

(New York Supreme Court, Appellate Division, Third Department. September 8, 1920.)

183 New York Supplement. 912

1. MASTER AND SERVANT — COMPENSATION CLAIMANT'S INJURY SHOWN TO HAVE ACCELERATED SYPHILIS.

In a proceeding under the Workmen's Compensation Act, a finding that syphilis was accelerated by the accident *held* a legitimate inference from the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4.])

2. MASTER AND SERVANT—FINDING OF FACT CONCLUSIVE ON APPEAL FROM COMPENSATION AWARD.

A finding of fact by the Industrial Commission, supported by evidence, is conclusive on appeal from award under the Workmen's Compensation Law.

(For other cases, see Master and Sevant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — COMPENSATION ALLOWABLE, THOUGH DISEASE ACCELERATED BY INJURY WOULD EVENTUALLY HAVE DEVELOPED.

Where a syphilitic infection was accelerated by an injury, it is no answer to claim for compensation under the Workmen's Compensation Act that the disease or infection did not naturally and unavoidably result from the injury; it being sufficient that the disease existed at the time of the injury, and was thereby accelerated to such an extent as to impair earning capacity, and it is immaterial that, if the accident had not occurred, the claimant eventually, but at a later period, would have developed into a paralytic.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

Woodward and Kiley, JJ., dissenting.

Appeal from State Industrial Commission.

Proceeding by Frederick Finkleday under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by Henry Heide, Incorporated, the employer, and the Globe Indemnity Company, insurance carrier. There was an award of compensation, and the employer and insurance carrier appeal. Award affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Robert M. McCormick, of New York City (Joseph F. Murray, of New York City, and Irving W. Young, Jr., of White Plains, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. [1-3] The finding of the commission is that at the time of the accident, consisting of a fractured wrist, "the claimant had a syphilitic infection, and the injuries which he sustained were the activating cause in calling into activity general paresis." It does not appear whether his unfortunate affliction results from the sins of

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his ancestors or his own sins. It is immaterial under the statute, we are now administering. The above finding is sustained by the evidence It was testified that paresis, or, as it is sometimes called. general paralysis, is due to syphilis, and substantially that any injury, whether a fractured wrist or otherwise, or even an emotional injury, in a syphilitic person, may be an activating factor in the developement of paresis. Although at the time of the accident the claimant had the syphilitic disease, it had not at that time apparently developed itself, and did not interfere with his ability to work. But about a week thereafter he began to act queerly, and about three months thereafter went to the hospital, where he has since remained. That the disease has been accelerated by the accident is clearly a legitimate inference from the evidence. The finding of the commission on that point is a finding on a question of fact, and conclusive.

It is perhaps true that, if the accident had not occurred, the claimant eventually, but at a later period, would have developed into his present condition. But that does not militate against this award. It is no answer to this claim to argue that the disease or infection from which the claimant suffers did not naturally and unavoidably result from the injury. It is sufficient if the disease existed at the time of the injury and was thereby accelerated to such an extent as to impair the earning capacity. Both sides of that question were discussed in Matter of Van Keuren v. Dwight Divine & Sons, 179 App. Div. 509, 165 N. Y. Supp. 1049; affirmed 222 N. Y. 648, 119 N. E. 1083. That was a tuberculosis case, and in principle cannot be distinguished from the case we are now considering. If we give it application here, an affirmance of this award must follow.

I advise such affirmance.

John M. Kellogg, P. J., and Henry T. Kellogg, J., concur.

WOODWARD, J. (dissenting). The State Industrial Commission finds as conclusions of fact that—

"On December 28, 1917, while said Frederick Finkleday was engaged in the regular course of his employment, and after making delivery of goods, * * * the claimant, in closing the back of said truck, fell from the tailboard to the street, as a result of which he sustained a fracture of the left wrist. At the time of the accident the claimant had a syphilitic infection, and the injuries which he sustained were the activating cause in calling into activity general paresis, which disabled him from April 3, 1918, to September 8, 1919, on which date he was still disabled, and which disability was the direct result of the injuries sustained on December 28, 1917."

Upon the basis of this finding the commission has made an award and continued the case for further hearing. The employer and the insurance carrier apeal from the award.

The claimant and the employer. on the 29th of January, 1918, entered into an argreement, approved by the commission, for the payment of compensation, and payments were made under such agreement down to May 24, 1918. These payments were credited upon the award as subsequently made by the commission, and the question here is whether the employer and insurance carrier may be charged for the disability resulting, not from the fractured wrist, but from the paresis, now in an advanced stage.

While the claimant's wife expressed the opinion that the claimant received an injury to his head at the time of the fall, there is no evidence to support such a conclusion, and the commission has made no finding, other than that the claimant sustained a fracture of the wrist, and that "the activating cause in calling into activity general paresis"

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was the injury thus received; that is, that the claimant having a well-developed case of syphilis at the time of the injury, and which the evidence shows was a sufficient inducing cause of the general paralysis which produces his present disability, is to be permitted to become a charge upon the employer's industry, upon the theory that a simple fracture of the wrist has caused general paralysis, the present technical description of paresis.

The injury to the wrist, as it appears from the testimony, is practically healed, and there is no evidence in this case that the syphilitic condition was dormant at the time of the injury. Indeed, the commission finds that "at the time of the accident the claimant had a syphilidic infection," so that it cannot be that the disease or infection was produced by the accident, and it is only "such disease or infection as may naturally and unvoidably result therefrom"—from the accident—that is to be understood as coming within the provisions of the statute. Workmen's Compensation Law (Consol. Laws, c. 67), § 3, subd. 7; Borgsted v. Shults Bread Co., 180 App. Div. 229, 232, 167 N. Y. Supp. 647.

In the case cited, the only substantial difference in the facts is that in the one case an ankle was broken, while in the case at bar it is a wrist. The same syphilitic condition existed, and the award was for the loss of eyesight, while here it is for total disability, due to paresis.

Both result, not from the accident, but from the active syphilitic condition of the claimant at the time of the accident, and it is not within the contemplation of the statute that the disease contraced prior to the acident shall be made the basis of a burden upon the industry of those who are seeking to better their condition. Unless we are to overrule the case of Borgsted v. Shults Bread Co., supra, and disregard the plain limitations of the statute, this award must be reversed.

The case of Schlenker v. Garford Motor Co., 183 App. Div. 166, 170 N. Y. Supp. 439, where the injured party died from tuberculosis of the brain, and the medical testimony indicated that the disease was dormant until brought into activity by a blow upon the head, goes as far perhaps, as any case decided in this state. But this case did not necessarily determine the point suggested, as it might properly have been disposed of upon the theory that the parties had themselves agreed upon the compensation, and the employer was merely seeking to reopen the case and to avoid the payment. However, the case, which was one of death, merely goes to the proposition that a dormant case of tuberculosis, made active by a blow upon the head, may accelerate the death, and thus give rise to the death benefits, which are essentially different from the compensation awards. There the evidence was sufficient to sustain the fact that the blow upon the head was a sufficient inducing cause of the active manifestation of an otherwise dormant disease, while here the evidence clearly indicates that the syphilitic condition was virulent, and that the result was to be anticipated without the intervening injury to the wrist.

The award should be reversed, and the case should be disposed of upon the basis of the injury to do the wrist alone, as suggested by Commissioner Lyon. In the absence of evidence, it cannot be presumed that paresis, resulting from syphilis, is induced by a fracture of a wrist; that it is a disease or infection naturally and unavoidably arising out of an accident of this character.

The award should be reversed.

Kiley, J., concurs.

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HEIDEMANN v. AMERICAN DISTRICT TELEGRAPH CO. et al.

(New York Supreme Court, Appellate Division, Third Department. September 8, 1920.)

183 New York Supplement. 924

MASTER AND SERVANT—INJURY TO WATCHMAN BY STRAY BULLET HELD NOT ONE "ARISING OUT OF EMPLOYMENT," WITHIN COMPENSATION ACT.

Where an employee patrolling streets at night, guarding stores for employer furnishing burglar and watchman service, was struck by bullet shot by a policeman pursuing a burglar in a distant part of the city, unrelated to the employee's work, the injury did not arise out of the employment within the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases,, First and Second Series, Course of Employment.)

John M. Kellogg, P. J., and Kiley, J. dissenting.

Appeal from State Industrial Commission.

Proceeding under Workmen's Compensation Law (Consol. Laws, c. 67) by Mrs. Nellie Heidemann for compensation for the death of Carl Heidemann, opposed by the American District Telegraph Company, employer, and the Royal Indemnity Company, insurer. Award for claimant by State Industrial Commission, and employer and insurer appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane. Henry T. Kellogg, and Kiley, JJ.

Frank J. O'Neill, of New York City (Barnett Cohen, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J., The business of the employer was to furnish burglar and watchman service. The duty of the deceased employee was to patrol the streets at night guarding and protecting stores in the course of his employment. A burglary had occurred in a distant part of the city entirely unrelated to the work of the deceased. A police officer was in pursuit of the fleeing burglars. He shot at one of them, but the bullet missed its aim and accidentally struck and killed Heidemann, the employee. The bullet which caused his death was not intended for him, but for the fleeing burglars. If it had struck the motorman of a passing street car, or any other employee engaged in his usual employment, the same argument could be made, as is here made, that the accident arose out of the employment in which the injured employee happened to be engaged. I think there is no causal relation between the accident and the employment.

The case of Matter of Redner v. H. C. Faber & Son, 223 N. Y. 379, 119, N. E. 842, contains nothing favorable to this claim, for the reason that this accident did not occur because of an ordinary risk incidental to a street, nor do the usual perils of a street involve exposure to flying bullets. This bullet might have reached its victim, if he had not been on the street. If the deceased had been shot under the same

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circumstances, while on the premises of his employer, the case would be no different. The work in which the deceased was engaged bore no relation to the accident. The stray bullet might have caused the death of any other person who happened to be in its course. The work which the deceased was doing did not induce or cause the firing of the fatal shot. That act was entirely independent of the employment and unrelated thereto. The accident, therefore, did not arise out of the employment.

The award should be reversed, and the claim dismissed.

Woodward and Henry T. Kellogg, JJ., concur.

JOHN M. KELLOGG, P. J. (dissenting). The employer was engaged in furnishing, maintaining, and operating burglary alarm, and watchman service, and the deceased employee was engaged in that service when he was shot, on Montague street, Brooklyn, by a probation officer of the police department. A burglary had been committed and two officers were in the immediate pursuit of the two burglars along Montague street, and an officer, hearing the men running, fired in the air to halt them. They paid no attention. he again shot at one of the burglars, with the result that the employee was hit and killed. The nature of the employment, the fact that the employee was going from store to store, seeing that the doors were closed and that no one was within at this hour of the morning, exposed him to a peculiar hazard from night prowlers, or from the police, who might readily misunderstand his movements. He met his death when the police were pursuing and trying to wound the burglars.

In Matter of Redner v. Faber & Son, 223 N. Y. 379, 382, 119 N. E. 842, the court considers with approval the English case of Dennis v. White & Co., [1917] App. Cas. 479, quoting as follows:

"If a servant in the course of his master's business has to pass along the public street, whether it be on foot or on a bicycle, or on an omnibus or car, and he sustains an accident by reason of the risk incidental to the streets, the accident arises out of as well as in the course of his employment. * * * The use of the streets by the workman merely to get to or from his work of course stands on a different footing, altogether. but as soon as it is established that the work itself involves exposure to the perils of the streets the workman can recover for any injuries so occasioned.

Concededly the injury was received in the course of the employment, and, in my judgment, the risk was so far connected with the employment that we may consider that it arose out of it.

The award should therefore be affirmed.

Kiley, J., concurs.

HOFFMAN v. PIERCE ARROW MOTOR CAR CO. et al.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement. 766

1. MASTER AND SERVANT—DEATH FROM OPERATION HELD NOT RESULT OF "ACCIDENTAL INJURY," WITHIN COMPENSATION ACT.

Where a servant suffered double hernia, and requested the surgeon, when performing the operation, to remove his appendix, and died from peritonitis caused by the operation for the appendix, death was not the

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result of "accidental injury" occurring in the course of the employment, within the meaning of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.)

2. MASTER AND SERVANT—DEATH NOT SHOWN TO HAVE BEEN RESULT OF ACCIDENTAL INJURY, WITHIN COMPENSATION ACT.

In a proceeding to obtain compensation for the death of a servant dying of peritonitis following an operation, a finding that death resulted from an accidental injury occurring in the course of the employment, within the meaning of the Workmen's Compensation Law, *held* not sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act (Consol. Laws, c. 67) by Nina M. Hoffman, on behalf of herself and her minor son, to obtain compensation for the death of her husband. Peter W. Hoffman, opposed by the Pierce Arrow Motor Car Company, the employer, and the Employers' Mutual Insurance Company of New York, insurance carrier. There was an award of compensation, and the employer and insurance carrier appeal. Award reversed, and matter remitted for further proof.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Dudley, Stowe & Sawyer, of Buffalo, for appellants.
Charles D. Newton, Atty. Gen., for State Industrial Commission.

Henry T. Kellogg, J. The deceased employee, for whose death this award was made, sustained a double hernia while assisting three other workmen in lifting the body of an automobile for his employer, the Pierce Arrow Motor Car Company. Within a few days he was operated upon for hernia by two surgeons named Reagan and Pinkerton; the former operating for the hernia on the left-hand side of the abdomen, and the latter for the hernia on the right-hand side. When the incision was made upon the right-hand side, the appendix appeared in the opening and was removed by Pinkerton with the consent of Reagan. The patient remained in the hospital for about 10 days, during which period he made favorable progress towards recovery. At the end of that period he insisted upon going home, which course, although not approved by the hospital authorities, was permitted by them. Reagan says that when he came home the deceased was running a temperature; that he had abdominal tenderness and distention; that he was placed in bed, where he remained for about two weeks. He was then returned to the hospital, and within a few hours after his arrival died from a disorder diagnosed as peritonitis by both physicians.

An autopsy was thereafter performed by Dr. Williams and Dr. Bentz, of the city of Buffalo, who were characterized by Reagan as "noted physicians." Reagan testified concerning his observations made at the autopsy, that the two operative wounds were free from infection, had fully healed, and were clean wounds. He also said that the body

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of the deceased "was just full of abscesses all over, all over the abdominal cavity," and that, "from my observations, all this trouble started around the appendix." Reagan did not venture the opinion that the peritonitis resulted from the operations, except as it may be inferred from the testimony quoted that it was his view that the operation upon the appendix was the cause. His testimony may have been animated by the desire to throw the blame exclusively upon Pinkerton, who removed the appendix.

Pinkerton testified that when the deceased left the hospital there had been no steady rise in temperature, no rapid pulse, nor distention of the abdomen; that all these indications of peritonitis would have appeared within 72 hours, if the opreation had been the cause; that all the operative wounds were smooth and clean; that the stump of the appendix was normal; that no infection causing peritonitis resulted from the operations. It was his opinion that the peritonitis came from the bursting of pus sacs, the presence of which in the abdomen was due to disconnected causes. Concerning the operation for the removal of the appendix, Pinkerton testified he had been requested by the deceased to remove it while operating for hernia. He was corroborated in this statement by two nurses, one of whom testified that before the operation Pinkerton said that he had been requested by the deceased to remove his appendix, and the other that after the operation the deceased said that his appendix had been removed and that he had wanted it done.

[1, 2] It is clear that the operation upon the appendix was not made necessary by the accident which caused the hernia. As the only medical testimony given, tracing the peritonitis and death back to the operations, is that of Reagan, who impliedly gives the appendix operation as the cause, it follows that the death was not shown to have resulted from an accidental injury occurring in the course of the employment. It is a significant fact that the two noted physicians who performed the autopsy were not called, so that the only medical testimony appearing in the record was given by surgeons interested in absolving themselves from blame. In view of this fact, it apepars to us that the just course to follow is not to dismiss the claim, but to return it to the comm'ssion for further proof as to the causal relation between the accidental injury and the death.

The award should be reversed, and the case remitted to the commission for further proof. All concur, except John M. Kellogg, P. J., who votes for affirmance

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YODAKIS v. ALEXANDER SMITH & SONS CARPET CO.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement 768.

MASTER AND SERVANT — COMPENSATION CLAIMANT, A WEAVER PLACING SUBSTANCE ON BELT, HELD NOT ACTING WITHIN SCOPE OF EMPLOYMENT.

Where an employer employed men to fix looms and belts, and forbade machine operators to do so, the weaver, operating a loom, was acting outside of the scope of his employment in placing substance on the belt to increase friction and the speed of the loom before the whistle sounded

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for commencement of work, as the employer's rule did not merely direct the manner of doing his work, but limited the sphere of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Frank Yodakis, also called Frank Utaliyz, for compensation for injuries, opposed by the Alexander Smith & Sons Carpet Company, employer and self-insurer. Compensation was awarded for fracture of left forearm, and the employer appeals. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Wallin, Beckwith & Edie, of Yonkers, for appellant.

Charles D. Newton, Atty. Gen .(E. C. Aiken, of Albany, of counsel), for the State Industrial Commission.

Henry T. Kellogg, J. The claimant was employed as a weaver in a carpet factory to work upon a loom. About two minutes before the morning whistle blew to begin the day's work, on the day of the accident, he inserted his arm behind the guard upon his machine to place a gritty substance upon the belt to increase friction and thereby the speed of the loom. While thus engaged the moving belt caught the sleeve of his shirt and drew his arm between the belt and the pulley, with the result that he received a fracture of the arm. The claimant himself had said that his act was strictly against orders; that loom fixers and belt fixers were employed to make all repairs on belts and looms; that, if he had been caught doing that which caused the accident, he would have been discharged.

It has been held that a laborer, employed to sharpen tools, who received an injury by inserting his hand into a machine to restore to a moving pulley a belt which had slipped therefrom, was within the course of his employment, though his act was contrary to orders (Whitehead v. Reader, 3 W. C. C. 40); that a workman employed to oil machinery, who received injury while oiling a moving machine in violation of instructions, was in the course of his employment (5 W. C. C. 80); that a workman employed to stand and turn a wheel, who contrary to orders sat while working, was in the course of his employment when injured (8 B. W. C. C. 324); that an employee, who was injured while removing material caught in a machine which he was operating was in the course of his employment, though doing a forbidden act (Macechko v. Bowen Mfg. Co., 179 App. Div. 573, 166 N. Y. Supp. 822). In the last-named case Mr. Justice Lyon, of this court, defined the test to be applied perhaps more clearly than it elsewhere has been stated. He there said that the determining question was "whether the order which was disobeyed limited the sphere of the workmen's employment, or was merely a direction not to do certain things, or to do them in a certain way, within the sphere of employment."

The cases cited are examples of workmen doing the work which they were employed to do, but doing it in a wrong, careless, or forbidden way. The following are illustrations of injuries received outside of the scope of the employment: An injury received by a night watchman, who, while sitting in a chair, dozed off and fell from a window (Matter of Gifford v. Patterson, Inc., 222 N. Y. 117 N. E. 946, 6 A. L. R. 576); an injury received by a workman, who had stepped away from his machine to say good-by to a fellow workman who had been drafted to

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fight for his country (Matter of Di Salvio v. Minihan Co., 225 N. Y. 123, 121 N. E. 766); an injury to a boy employed to dip cans while attempting to operate a machine in violation of orders (Matter of Rind.no v. Continental Can Co.,226 N. Y. 565, 123 N. E. 886, reversing 186 App. Div. 925, 172 N. Y. Supp. 916). In these cases it was held that the employees were without the sphere of their employment and the awards were reversed. In Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750 L. R. A. 1917A, 344, Judge Pound, writing for the court, said:

"The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident to the work."

In the case before us the employer had done more than merely to promulgate rules forb.dding employees while actually engaged in work for which they were hired from doing that work in particular ways. He had drawn a line strictly dividing repair work from work of production, and had forbidden all operators of machines from doing the work of repair. This claimant had not begun to do the work for which he was hired when the accident occurred which caused the injury. Before the whistle to begin his work had sounded, he was injured, not in making carpets, for which he was solely employed, but in repairing or adjusting his machine for the work of the day. The rule which he broke was important, not because it made him a violator of his master's orders, but because it defined the limits of his employment, and in the particular instance established that he passed beyond them and stepped out of the sphere of his employment. The case is exceedingly close, but it seems to me that under the authorities cited the balances tip against the claimant.

The award should be reversed, and the claim dismissed.

Woodward, Cochrane, and Kiley, JJ., concur.

JOHN M. KELLOGG, P. J. (dissenting). The claimant, while working at his machine, was at fault in disobeying instructions, and his injury resulted therefrom. But compensation is awarded—

"without regard to fault as a cause of such injury, except where the injury is occasioned by a willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty." Workmen's Compensation Law, § 10.

Clearly he did not intend to injure himself or another, and within the above provision I think he has not lost his rights under the act.

I favor an affirmance.

SABATELLI v. DE ROBERTIS et al.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement 796.

MASTER AND SERVANT—INJURY TO ICE CREAM STORE EMPLOYEE PROCURING BAIL FOR CUSTOMER HELD NOT ONE ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

Where an employee in an ice cream store, whose employment was hazardous ,as defined in Workmen's Compensation Law, § 2 group 34, was directed by his employer, who had an interest in an adjoining saloon,

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to go to the police station to see if bail offered for a customer arrested in the saloon was satisfactory, and he broke his leg when pushed by an officer at the station house, the injury was not an accidental injury arising out of and in the course of his employment, within section 3, subd. 7, so as to justify an award against the employer and insurance carrier.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases,, First and Second Series, Course of Employment.)

John M. Kellogg, P. J., and Cochrane, J., dissenting.

Appeal from State Industrial Commission.

Claim by Michael Sabatelli for compensation under the Workmen's Compensation Act against Vito De Robertis, employer, and the General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scottland, insurance carrier. From an award of the State Industrial Commission in favor of claimant the employer and insurance carrier appeal. Award reversed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Alfred W. Meldon, of New York City, for appellants.

Charles D. Newton, Atty. Gen., and E. C. Aiken, Deputy Atty. Gen. (Bernard L. Shientag, of New York City, of counsel), for respondent.

KILEY, J. On March 10, 1919, the claimant was working for the employer appellant, as manager and salesman in a pastry, ice cream, and confectionary store at 176 First avenue, New York City. Next door was a saloon, in which the employer had an interest. On the day aforesaid one Loblino was arrested at the place for carrying a concealed weapon (revolver). The claimant's employer furnished a man to go upon his bail bond, and sent claimant to the precinct or police station to see if the bail offered would be acecpted; if not, he was to telephone Vito De Robertis, his employer, and he would go down and fix it. The bondsman offered was accepted, and the defendant, with the bondsman and officer, went upstairs, presumably, to execute the papers. Claimant, after waiting for them to come downstairs, so that he could ride back to his work in the automobile in which he came to the station, went upstairs to see what caused the delay. At or near the the head of the stairs, an officer pushed him, so that he fell down stairs and broke his leg. The Industrial Commission awarded claimant compensation, and from that award the appellants appeal.

It seems to have been conceded that claimant's employment, when at the store, was hazardous, as that term is defined in Compensation Law (Consol. Laws, c. 67) § 2, group 34. The ground of this appeal,, and for which appellant claims reversal, is that the injury was not received in the course of his employment; that it was not an accidental injury arising out of and in the course of his employment. Section 3, subd. 7, Workmen's Compensation Law. The responsibility of the appellant insurance company is founded on contract, and the contractual relation between it and the employer must needs always be kept in mind when considering the question of its liability. The sole question here is: Was this injury received while the employee, claimant, was performing a service incidental to the character of the business of his employer in which he was employed, and for the protection of which the insurance company entered into this contract. McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, in effect holds the above rule of construc-

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tion, and that the character of the business in which the employee is engaged when injured must not be "independent of the relation of master and servant." The relation of master and servant existed, and we get back to the query: Was what claimant was doing incidental to the service for which he was employed, and for harm from which the insurer engaged to indemnify the employer?

The respondents urge that the contract of insurance covers this injury, and that the service he was rendering at the time he received it was incidental to the business of his employer. Our attention is called to three authorities which respondents urge support their contention: Clarke v. Roger I. Sherman, Inc., 184 App. Div. 921, 170 N. Y. Supp. 1073. In this case the employer was a canning company., It raised beans for canning in its own factory; employee was injured while gathering the beans from the field to take to the employer's factory to be canned; held, this was the service within the scope of his employment for the canning factory as such, and not as a farmer.

O'Dell v. Bowman, 189 App. Div. 387, 179 N. Y. Supp. 592. Here the claimant was sent out to prune apple trees. While there he mounted a ladder to pick apples off the trees he was about to prune or trim. The property was purchased for investment and profit. The claimant was engaged in repairing the buildings and surroundings for his employer, so that it would present a more attractive appearance, no farming was carried on. Held, and rightly so, that picking the apples, as they were picked, and under the circumstances existing, relative to the same, that claimant was not a farmer.

Driscoll v. Henry Gillen & Sons, 187 App. Div. 908, 173 N. Y. Supp. 825, affirmed without opinion 226 N. Y. 568, 123 N. E. 863. The deceased employee was captain on a lighter, had been ashore for food and drink, and was drowned at the pier when returning to his boat. In these cases it was properly held that the employee was performing an act or acts incidental to the service for which he was employed, and by reason thereof came under the provisions of the Workmen's Compensation Law.

Section 10 of the Compensation Law provides that the employer shall be liable for disability or death of the employee resulting from an accident "sustained by the employee arising out of and in the course of his employment. In Matter of Moore v. Lehigh Valley Railroad Co., 169 App. Div. 182, 154 N. Y. Supp. 623, Mr. Justice Lyon, formerly of this court, in a very able opinion, says of section 10 and the construction of the language used:

"The use of the conjunction in the section above quoted indicates that the accidental injury must both arise out of and in the course of the employment. An accidental injury sustained during the course of the employment, but not arising out of the employment, as well as such an injury arising out of the employment, but not sustained during the course of the employment, does not fall within the provisions of the Workmen's Compensation Law.

Again, at page 184 of the opinion in 169 App. Div. (154 N. Y. Supp. 625) he says:

"A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contrct of service."

Volume 181 of the New York Supplement reporting 126 N. E. 713, has the opinion of the court of Appeals in Kender v. Reineking et al., which appellants urge is controlling and decisive in their favor on this appeal. The circumstances are radically different. In the Kender Case the contract for service was 6 days a week at $3 per day, and the period of service ended Saturday night, at the usual quitting time. The court held that the service the employee was to render in repairing the auto was an independent contract, and for work not designated as

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hazardous under the Compensation Law; that because it was the same employer did not signify; it was the same as if he had hired to do the same job for a third party. Newman v. Newman, 218 N. Y. 325, 113 N. E. 332, indulging in the same presumption in which the Court of Appeals indulged, comes nearer the principle that must be passed upon here. The employee was engaged as driver and deliveryman on a meat wagon. No deliveries were made after 7 p. m., and the employee started out to make a delivery on foot, tripped over a pail of broken glass, severing a varicose vein, and bled to death. The court says:

"Assuming that the deceased, while engaged in the deliveryy of meat with a horse and wagon and in any work under his employment incidental thereto, would come within group 41 quoted, such provision of the act is inapplicable to the facts enumerated, because the employee was not at the time either directly, indirectly, or incidentally engaged in the operation of a wagon propelled by a horse."

Assume that Loblino had been engaged in a row on the street, and the employer had sent claimant out to help Loblino against his opponent, and there received this injury; could it be successfully urged that the contract of insurance covered such injury? Is there any distinction in principle between this and that claimed for? The proposition that this injury arose out of and in the course of claimant's employment, and by reason thereof was contemplated under this contract of insurance, cannot be sustained. What he was doing was outside of his contract of employment, and was not such service as is designated as hazardous. The award should be reversed.

Award reversed, and claim dissmissed.

Woodward and Henry T. Kellogg, JJ., concur.

John, M. Kellogg, P. J. (dissenting). The employer was carrying on an ice cream parlor, in which the claimant was employed. Next door a liquor saloon was carried on in his name and in which he was interested. A customer of both places was arrested in the liquor saloon, and the employer asked his employee in the ice cream parlor to arrange bail. Evidently it was for the interest both of the liquor saloon and the ice cream parlor that the customer should be well treated, and it was well within the scope of the employment that the employee, upon the order of the employer, should render the service he was rendering at the time of his injury. If the employer was a self-insurer, he could not well contest this claim. The protection of the employee is the same whether the employer has insurance or is a self-insurer. The insurer meets every liability against the employer. We conclude upon the facts that the employer is liable, and that liability attaches to the insurer. Workmen's Compensation Law, § 54, subd. 2. When an employee in the ordinary performance of his duty, is assaulted and injured thereby, he is entitled to compensation.

Cochrane, J., concurs.

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BUBNIAK v. JOHN K. STEWART & SONS et al.

(New York Supreme Court, Appellate Division, Third Department. July 8, 1920.)

183 New York Supplement. 812

MASTER AND SERVANT — COMPENSATION AWARD, BASED SOLELY ON TABLE ADOPTED BY COMMISSION, IS INVALID.

An award of compensation for the loss of 72 per cent. of the use of a hand, because of the loss of the thumb and forefinger, which was based solely on a table adopted by resolution of the commission, fixing the percentage of loss of use of the hand occasioned by specified injuries, must be set aside.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

John M. Kellogg, P. J., and Cochrane, J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Anthony Bubniak, as employee, against John K. Stewart & Sons, employer, and the American Mutual Liability Insurance Company, insurance carrier. From an award of compensation by the Industrial Commission, the employer and insurance carrier appeal. Award reversed, and matter remanded to commission for further action.

Argued before John M. Kellogg, P. J. and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Jeremiah F. Connor, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Commission.

HENRY T. KELLOGG, J. The claimant received an injury in the course of his employment through an accident arising out of the employment, by which he sustained a loss of the first phalange of the first finger, a loss of the first phalange of the thumb, together with the greater part of the second phalange. It is provided in section 15 subd. 3, of the Workmen's Compensation Law (Consol. Laws, c. 67):

"The loss of more than one phalange shall be construed as the loss of the entire thumb or finger."

Claimant, therefore, came within the provision of the same subdivision which reads:

"Where the injury results in the loss of more than one finger, compensation therefore may be awarded for the proportionate loss of the use of the hand thereby occasioned."

Under this provision he recived an award as for the loss of 72 per cent. of his hand. The difficulty with the award is that no proof was given as to the proportionate loss of the use of the hand, and no independent judgment was exercised by the deputy commissioner, who tried the case, or the Industrial Commission, which approved the award made by him. Without taking any proof as to proportionate loss the deputy commissioner made the award with the following comment:

" I hold that this hand comes clearly within the schedule adopted by the commission, and the award recommended is made of 72 per cent. loss of hand, or 175.68 weeks, at $10.58—total award of $1,858.69."

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The record shows that on or about December 17, 1919, the Industrial Commission adopted a resolution by which it promulgated as a guide for awards to be made a schedule of percentage hand losses. This consisted of varying percentages for 26 different injuries, where more than two fingers are lost. The loss of the use of the hand is prescribed to be 72 per cent., where the thumb and first finger are lost, 68.5 per cent. where the thumb and second finger are lost, 67.5 per cent. where the thumb and third finger are lost, and 65.4 per cent. where the thumb and fourth finger are lost.

It is entirely clear that the proportionate loss of the use of a hand cannot in advance be determined for every case with such nicety that even a loss of use amounting to less than a fraction of 1 per cent. can be given It is equally clear that in the case of every individual claimant the loss of a finger and thumb, even though the physical loss be exactly the same, would impair the use of the hand to a greater degree or a less degree, depending upon the adaptibility of the claimant and other considerations. While the use of the schedule may be proper to a certain extent as a general guide to prevent widely disproprtionate awards, it certainly cannot furnish the sole basis for the rendering of a decision as to a particular loss sustained. To accord to it such virtue would be tantamount to holding that the Industrial Commission was invested with legislative powers. We do not think that this award, which was based exclusively upon the schedule, and involved no exercise of judgment upon the part of the Industrial Commision or the deputy commissioner, can be sustained.

The award should be reversed, and the claim remitted to the commission for its further action.

Woodward and Kiley, JJ., concur.

JOHN M. KELLOGG, P. J., (dissenting). The question for the commission to determine was what proportion of the hand was lost. It needed no evidence upon the subject. It saw the hand, and no evidence could give it any additional information. The hearing was before a deputy commissioner. The commission had promulgated certain rules as to proportionate losses to guide its deputies and itself, perhaps, in the ordinary cases where there was no contest. Under section 67 of the law, it had the right to make rules covering its method of hearing cases and as a guide to its subordinates on the performance of their duties. The deputy in this case stated the rule, and the counsel raised no objection to it, and did not ask to put in any evidence upon the subject or question the justice of the rules. Of course, the commission could not decide a case in advance, and fix rules to govern its own discretion, or the discretion of its deputies, in judicial decisions. But it may well say that in ordinary cases the loss of the thumb and a finger is such a proportionate loss of the entire hand. The rules are not arbitrary; they are tentative suggestions, which naturally will be followed in ordinary cases.

The commission made its award on the evidence. I favor an affirmance.

Cochrane, J., concurs.

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SATTERFIELD v. WAHLQUIST.

(Supreme Court of Pennsylvania. Nov. 28, 1919.)

111 Atlantic Reporter 253.

MASTER AND SERVANT—COMPENSATION AGREEMENT NOT SUBJECT TO TERMINATION AS TO CHILDREN FOR MOTHER'S SETTLEMENT WITH WRONGDOER.

The employer cannot have compensation agreement for death of an employee terminated because of the widow receiving money in settlement of her claim against the party causing the death; the rights of the children, unless changed by death, being fixed by that agreement, and unaffected by any action of their mother.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Court of Common Pleas of Philadelphia County; William C. Ferguson, Judge.

Proceeding under the Workmen's Compensation Act between Lucy Satterfield and William Wahlquist, trading as the Powelton Garage, employer. The employer's appeal from decision of the Workmen's Compensation Board, on his petition for termination of the compensation agreement, was dismissed, and he again appeals. Dismissed.

The opinion of Ferguson, J., in the court below is as follows:

We cannot sustain this appeal from the decisions of the Workmen's Compensation Board. Rights of subrogation under the Compensation Act do not relate to the award or agreement of compensation. They relate rather to the rights as between the employer and the one who caused the injury. Whether or not there is a right in this case that may be asserted against the defendant in the common-law action we do not decide, because the matter is not before us. We are interested only in the compensation agreement. The rights of the children, unless changed by death, are fixed by that agreement, and cannot be affected by any action of the mother. So far as she is concerned, the compensation board has modified the agreement, and their action in that respect cannot be changed by this court.

The appeal is dismissed.

Argued before Brown, C. J., and Stewart, Walling, Simpson, and Kephart, JJ.

Maurice W. Sloan, of Philadelphia, for appellant.

PER CURIAM.. The husband of the appellee, while in the employ of the appellant, was struck by an automobile belonging to the Richards-Kelly Company, and sustained injuries which resulted in his death. The appellant executed an agreement to pay compensation for his death, which was approved by the compensation board. The appellee brought an action against the Richard-Kelly Company, which was discontinued upon its payment to her of a certain sum in settlement of her claim against it. Thereupon the appellant filed a petition before the referee for the termination of the compensation agreement, but it was dismissed. On appeal the compensation board modified the agreement by treating the sum paid to the claimant by the Richards-Kelly Company as an advance payment; but with this the appellant was dissatisfied and appealed to the court below.

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His petition for the termination of the agreement was there denied, for the reason given in the opinion dismissing his appeal, and on that opinion this appeal is dismissed, at the costs of the appellant.

SCOTT v. NASHVILLE BRIDGE CO.

(Supreme Court of Tennessee. June 22, 1920.)

223 Southwestern Reporter 844.

1. MASTER AND SERVANT—COMPENSATION ACT NOT COERCIVE IN ABOLISHING COMMON-LAW DEFENSES.

The Workmen's Compensation Act is not coercive because it deprives the employer of his common-law defenses, if he elects not to accept the act; the Legislature having the power to abolish such common-law defenses.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

19. MASTER AND SERVANT—COMPENSATION ACT NOT UNCONSTITUTIONAL AS BINDING MINOR EMPLOYEE.

Workmen's Compensation Act is not unconstitutional, in that it undertakes to make an election for and a binding contract upon a minor employee. when by reason of such minority he is unable to make such election or contract, since the act endows a minor, for the pupose of the act, with a power to elect.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

26. MASTER AND SERVANT—COMPENSATION ACT NOT UNCONSTITUTIONAL IN REQUIRING PHYSICAL EXAMINATION.

Workmen's Compensation Act is not unconstitutional because the provisions contained in section 25 thereof require an injured employee to submit to an examination and accept medical services, and deny to him the right of compensation so long as he refuses.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Bachman, J., dissenting.

Error to Circuit Court, Davidson County; A. B. Neil, Judge.

Action by A. J. Scott against the Nashville Bridge Company. Judgment for defendant. and plaintiff brings error. Modified and affirmed.

Atkinson & Atkinson, J. B. Daniel, and Geo. E. Kennard, all of Nashville, for plaintff in error.

Aust & McGugin, Cecil Sims, and Jno. M. Cate, all of Nashville, for defendant in error.

HALL, J. The sole question involved in this case is the costitutionality of chapter 123 of the Public Acts of the General Assembly of 1919, commonly known as the "Workmen's Compensation Act."

The appellant, A. J. Scott (plaintiff below) brought a common-law action in the circuit court of Davidson county against the Nashville Bridge Company to recover damages for personal injuries alleged to have been

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sustained by him through the negligence of said bridge company on the .....day of October, 1919, while in his employ, and subsequent to the date upon which the act above referred to went into effect, which was July 1, 1919.

The defendant, bridge company, filed a special plea, setting up the fact that the defendant was engaged, at the time the appellant sustained his injuries, in structural iron work and bridge building; that it had in its employ regularly more that ten employees, and that the alleged injuries to appellant arose out of and in the course of his regular employment. that under the terms of chapter 123 of the Acts of 1919, both the plaintiff and defendant had elected to accept and operate under the provisions of said act, and that defendant had complied with all the provisions of said act, and was ready, able, and willing to pay to apellant compensation for his injuries in accordance with the terms and provisions of said act, and that said act was a bar to his common-law action.

To this special plea appellant demurred, his grounds of demurrer being that the act was violative of the Constitutions of the state and of the United States in the particulars hereinafter referred to.

After consideration of the demurrer and appellant's declaration, the circuit judge overruled the demurrer. holding that the act was constitutional and valid.

Thereupon the parties agreed, in open court, that the facts set forth in the special plea were true, and judgment of the court was asked upon the defendant's plea and stipulation. Whereupon the court dismissed appellant's suit. To this action he excepted, and prayed and perfected an appeal to this court, and has assigned numerous errors.

The act under consideration is very voluminous and contains many sections, and we will not undertake to set out the act in its entirety in this opinion, but only such sections as we deem material in the determination of the question presented for decision. The title of the act is as follows:

"An act to provide an elective system of workmen's compensation for industrial accidents, to prescribe the manner of election and the rights and liabilities of employers, employees, and third parties; to define and regulate the liability of employers to employees for injuries sustained by such employees in the course of their employment resulting in disability or death; to provide medical and surgical care for such injured employees; to provide compensation for injured employees; or in case of death, for the dependents of such employees, to make claims payable hereunder preferred claims, and to make all sums paid as compensation under this act exempt from the claims of the creditors; to provide methods for insuring and securing the payment of such compensation; to make minors sui juris for certain purposes; to prescribe a method for the execution of this act and for the determination of liability of employers to employees for compensation, and to regulate the procedure in such cases; to provide revenue for the administration of this act; to provide for and regulate the business of insurance companies writing workmen's compensation insurance under this act, and to impose fees upon such insurance companies and upon employers and upon employees who are subject to this act; to provide penalties for violations of this act. and to make appropriations out of the revenue of the state for the purpose of executing and administering this act."

Section 1 of said act provides that it shall be known as the "Workmen's Compensation Act."

By section 3 it is provided as follows:

"Be it further enacted, that from and after the taking effect of this act, every employer and every employee, except as herein stated. shall be presumed to have accepted the provisions of this act, respectively to pay and accept compensation for personal injury or death by accident arising

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out of and in the course of the employment, and shall be bound thereby unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided."

Section 4 provides that either an employer or employee who has excepted himself by proper notice from the operation of the act may at any time waive such exemption and later accept its provisions. If the employer elects not to accept the provisions of the act, he shall give notice in the form and manner therein provided. If the employee elects not to accept the provisions of the act, he shall likewise give notice as provided in said section.

Section 6 provides that the provisions of said act shall not apply to the following classes of persons:

"(a) Any common carrier doing an interstate business while engaged in interstate commerce.

"(b) Any person whose employment at the time of injury is casual, that is, one who is not employed in the usual course of trade, business, profession or occupation of the employer.

'(c) Domestic servants and employers thereof, nor to farm or agricultural laborers and employers thereof.

"(d) In cases where less than ten persons are regularly employed: provided, however, that in such cases the employer may accept the provisions of this act by filing written notice thereof with the state factory inspector at least thirty days before the happening of any accident or death, and may at any time withdraw the acceptance by giving like notice of withdrawal.

"(e) To the state of Tennessee, counties thereof and municipal corporations; provided, however, that the state, any county or municipal corporation may accept the provisions of this act by filing written notice thereof with the state factory inspector at least thirty days before the happening of any accident or death and may at any time withdraw the acceptance by giving like notice of the withdrawal.

"This act shall not apply to employers engaged in the operation of coal mines nor to the employees thereof, except, that any employer engaged in the operation of a coal mine or mines, may accept the provisions of this act by filing written notice thereof with the state factory inspector at least thirty days before the happening of any accident or death, and may at any time withdraw the acceptance by giving like notice of withdrawal."

By section 11 it is provided that every employer who elects not to operate under said act as therein provided shall not, in any suit brought against him, by an employee who has elected to operate under the provisions of said act, to recover damages for personal injury or death arising from accident, be permitted to defend such suit upon any of the following grounds, viz.:

"(a) That the employee was negligent.

"(b) That the injury was caused by the negligence of a fellow servant or fellow employee.

"(c) That the employee had assumed the risk of the injury."

Section 12 provides that every employee who elects not to operate under the provisions of the act, in any action to recover damages for personal injury or death by accident brought against an employer who has elected to operate under the act, shall proceed as at common law, and the employer in such suit may avail himself of all common law defenses.

Section 13 provides that, when both employer and employee elect not to operate under the act, the liability of the employer for injury or death from accident shall be the same as at common law, and the employer

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may avail himself of all common-law defenses in actions brought by such employee to recover damages for personal injury or death due to accident.

It will be noted from the provisions of the foregoing sections of said act that, if an employer and employee do not elect to accept the act, the rights and remedies of each remain as they were before the passage of the act. If the employer elects to accept the act and the employee does not, then the employer's rights and remedies remain as they were before the passage of the act. If the employee elects to accept the act and the employer does not, then the employer is deprived of the three common-law defenses in any suit which may be brought against him by an employee to recover damages for an injury to such employee, to wit: Contributory negligence, negligence of a fellow servant. and assumption of risk. If both elect to accept the act (and their election is presumed in the absence of notice to the contrary), then the employer must pay to the employee compensation for his injuries according to the schedule set forth in section 28 of the act, without respect to whether the employee was negligent or not.

Section 10 provides, however, that if injury or death results from the willful misconduct of the employee, or injury intentionally self-inflicted, or by reason of intoxication or willful refusal to use a safety appliance, he shall not be entitled to compensation.

It is insisted by counsel for appellant that the act is coercive and not elective. because:

(1) The employee is presumed to have elected to accept the act, whether he actually knows of it or not, unless he give notice to the contrary; and

(2) It is coercive as to employer because if he does not elect to accept its provisions he is deprived of his common-law defenses.

In the case of Mackin v. Detroit Timken Axle Co., 187 Mich. 8, 153 N. W. 49, in which case the constitutionality of a similar act was involved, the court said:

"No constitutional provision is pointed out which prohibits the Legislature, in framing this law. to best avoid uncertainty and contention tending to litigation, from adopting a rule of conclusive presumption upon the question of notice so long as the employee was left in the first instance free to forestall, overcome, or prevent such presumption by his own act if he so desired.

"This being true, the constitutional objections raised, which are necessarily founded upon the idea of coercion, disappear because the employee has had a free choice, and by having failed to give notice, must be held to have elected his remedy under the Workmen's Compensation Law. Such legal presumptions are not unconstitutional or uncommon. A familiar illustration is the conclusive presumption that a party entitled to jury trial * * * has waived his right and elected to go to trial without a jury unless he took some affirmative action and made demand before a certain time or point of progress in the case arrived."

In the case of Young v. Duncan, 218 Mass. 346, 106 N. E. 1, the court was there passing upon the Workmen's Compensation Act of the state of Massachusetts, and, in discussing the very question presented by appellant in the instant case, said:

"No complaint justly can be made that the section compels the employee to elect without sufficient knowledge. Ignorance of the law commonly is no excuse for conduct or failure to act. * * * Knowledge as to interstate commerce rates may be inaccessible without very considerable inquiry, and yet shippers or passengers may be bound by them although ignornat of their terms. * * * The possibility that the employee in a given instance may not know all his rights does not affect the

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constitutional aspects of the law. Many crimes even are made to depend, solely, upon the doing of an act with the utmost moral innocence and in ignorance of any forbidding aspect of the act."

In State v. Pearce, Peck, 66, it is said:

"Every man is presumed to know the law; a contrary doctrine being incompatible with the nature of civil society."

In State v. Manley, 1 Overt. 428, it is said:

Every member of the community is bound to know the law. and it furnishes no excuse that he was badly advised."

[1] As to appellant's contention that the act is coercive because it deprives the employer of his common-law defenses if he elects not to accept the act, we do not think that the power of the Legislature to abolish these common-law defenses can be seriously questioned. These defenses are creatures of judicial opinions, and are not guaranteed or protected by the Constitution. This being true, the Legislature may modify or abolish them, as it sees fit. Their complete abolition does not render the act in question compulsary as to employers.

In the case of N. Y. C. R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D. 1, Ann. Cas. 1917D, 629, it was held:

That the "employer has no vested right to have the so-called common-law defenses perpetuated for his benefit, and that the Fourteenth Amendment does not prevent a state from establishing a system of workmen's compensation without the consent of the employer, incidentally abolishing the defenses referred to."

This question is fully considered by the Supreme Court of Wisconsin in Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489. In that case the court said: ,

"Passing these questions of classification we meet the objection that the law. while in its words presenting to employer and employee a free choice as to whether he will accept its terms or not, is in fact coercive, so that neither employer nor employee can be said to act voluntarily in accepting it.

"As to the employer, the argument is that the abolition of the two defenses is a club which forces him to accept; and as to the employee, the argument is that if his employer accepts the law the employee will feel compelled to accept also through fear of discharge if he do not accept.

"Both of these arguments are based upon conjecture. Laws cannot be set aside upon mere speculation or conjecture. The court must be able to say with certainty that an unlawful result will follow. We do not see how any such thing can be said here. No one can say with certainty what results will follow in the practical working of the law. * * * These matters are, however, purely speculative and conjectural; none can say what the practical operation of the law will be. It is enough for our present purpose that no one can say with certainty that it will operate to coerce either employer or employee."

To the same effect is the ruling of the Supreme Court of Illinois in the case of Deibeikis v. Link Belt Co., 261 Ill. 454, 104 N. E. 211. Ann. Cas. 1915A, 241.

It is insisted that the act contravenes section 17 of article 2 of the Constitution of the state, which provides:

"No bill shall become a law which embraces more that one subject, that subject to be expressed in the title."

It is said that the act embraces more than one subject and that it embraces subjects not expressed in its title, and that it repeals and amends former laws without reciting in the caption the title or substance of the laws repealed or amended.

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[2] It is first insisted that the act is broader than the title, in that the title mentions the regulation of the business of insurance companies writing workmen's compensation insurance under the act, whereas section 40 of the act provides:

"That every person, partnership, association, organization, or corporation, whether organized under the laws of this or any other state or country, which has or may hereafter comply with the laws of the state of Tennessee, and is authorized to write accident or indemnity insurance in the state of Tennessee, shall be authorized and empowered to write workmen's compensation insurance under the terms and provisions of this act and likewise every reciprocal or mutual insurance association or corporation shall have the like privilege, and shall be subject to the same tax on premiums now imposed by law on casualty or indemnity insurance underwriters."

It is said that, while the title only embraces the regulation of insurance companies, the body of the act relates to "every person, partnership, association, organization, or corporation," writing workmen's compensation insurance under said act. It is insisted that the words "person, partnership, association, organization, or corporation," are broader than the term "insurance companies," which is the subject expressed in the title.

Our general insurance statute provides that the term "company" includes "corporations, associations, partnerships and individuals." Shannon's Code, § 3274. Also such is the holding in many cases, some of which are as follows: State v. Stone, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St.Rep. 388, Singer Mfg. Co. v. Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Chicago Dock Co. v. Garrity, 115 Ill. 155, 3 N. E. 448.

[3] It is also said that both the title and the act contain two subjects, because each provides for a system of workmen's compensation, and also for a system of liability or accident insurance.

It is provided by section 41 of the act that the compensation shall be secured to the employee in one of two modes. Either the employer shall insure his liability under the act with an insurance company authorized to do business in the state, or shall furnish to the insurance commissioner satisfactory proof of his financial ability to pay all claims that may arise against him.

We think this provision of the act is germane to the general subject, in that it requires the employer to secure the compensation which may accrue, and thus prevents an insolvent or irresponsible employer from defeating the payment of the compensation for which the act provides. It is not a matter foreign to the subject of workmen's compensation, but is only a means provided for the securing of the compensation which the act provides.

[4] It is also said that the act embraces more than one subject, in that, in addition to providing for the payment of compensation to injured employee, it provides that the sums paid shall be exempt from the claims of the employee's creditors.

We think this is pertinent and germane to the subject of workmen's compensation, the purpose of this provision being to secure to injured employees reasonable compensation, so as to prevent them from becoming public charges, and, in the event of death, to secure the compensation provided by said act to their dependents. Providing that the compensation shall be exempt from the claims of creditors only renders certain the provisions of the act.

[5] It is next insisted that the act denies the employee the right to contract, and that this subject is not expressed in the title.

We are of the opinion that this insistence is not well grounded. Both the title and the body of the act expressly declare that the act is elective. Employees may accept the act and agree to work under its terms, or not.

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They are given free choice, and no right or remedy is taken away from an employee who elects not to accept the provisions of the act.

[6] It is next insisted that both the title and body of the act contain two subjects, in that they provide revenue for the state and compensation to employees.

The act does provide for the imposition of fines, after conviction, in case of a violation of certain of its provisions, and it does make appropriations from the revenues of the state of such sums as may be necessary to carry out the provisions of the act. To withhold the necessary revenue to carry out the provisions of the act would render it a nullity.

[7] The general disposition of the courts is to construe this provision of the Constitution liberally rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted. Cannon v. Mathes, 8 Heisk. 504; Heiskell v. Knoxville, 136 Tenn. 376, 189 S. W. 857; State v. Cumberland Club, 136 Tenn. 84, 188 S. W. 583.

[8] The generality of the title is no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. Cole Mfg. Co. v. Falls, 90 Tenn. 466, 16 S. W. 1045; Ryan v. Terminal Co., 102 Tenn. 11, 50 S. W. 744, 45 L. R. A. 303; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; Sate v. Cumberland Club, 136 Tenn. 84. 188 S. W. 583.

It is not essential to the constitutionality of a statute that its title should epitomize or recite in detail the provisions contained in its body. All provisions of the act which directly or indirectly relate to the subject expressed in the title, and having a natural connection therewith and not foreign thereto, should be held to be embraced in it. State v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Memphis v. St. Ry. Co., 110 Tenn. 598, 75 S. W. 730. Cannon v. Mathes, supra.

[9] It is next insisted that the act contravenes section 17 of article 2 of the Constitution. because it repeals former laws without reciting in its title or body the substance of the laws repealed.

A sufficient answer to this contention is that the act does not expressly purport to repeal, revive, or amend any other act. It simply repeals by implication. The constitutional provision referred to relates alone to those acts which expressly repeal, revive, or amend former laws. and does not embrace implied amendments. State v. Yardley, 95 Tenn. 558, 32 S. W. 481, 34 L. R. A. 656; Hunter v. Memphis, 93 Tenn. 571, 26 S. W. 828; Ballentine v. Mayor. 15 Lea, 633; Home Insurance Co. v. Taxing District, 4 Lea, 650; Poe v. State, 85 Tenn. 495, 3 S. W. 658; Railroad v. Crider, 91 Tenn. 507, 19 S. W. 618.

It is next insisted that the act violates section 8 article 11 of the state Constitution because: (1) Coal mine operators and their employees are exempted from the operation of the act while all other mine operators and their employees are included; and (2) the act exempts domestic and agricultural servants, casual employees, and all other industries having less than ten regular employees. The contention is that this classification is arbitrary, unreasonable. and discriminatory.

[10] It has been held by this court that when the classification made and stated in a statute is challenged, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. It is also the rule that one who assails the classification in a statute has the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L. R. A. 1916F, 177 State v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Ogilvie v. Hailey, 141 Tenn. 392, 210 S. W. 645.

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[11] It is the general rule that statutes public in their character, and otherwise unobjectionable, may extend to all citizens or be confined to particular classes. Cooley on Const. Lim. p. 390; Breyer v. State, 102 Tenn. 103, 50 S. W. 769; Sutton v. State, 96 Tenn. 696, 36 S. W. 697. 33 L. R. A. 589.

In this latter case it was held, however, that statutes which are intended to affect a particular class, and not the public at large must be so framed as to extend to and embrace all persons who are or may be in a like situation or circumstance, and also the classification must be natural and reasonable.

In Ogilvie v. Hailey, 141 Tenn. 392, 210 S. W. 645, this court said:

"The later decisions of this court and of the federal Supreme Court have conceded to the Legislature a very wide range of discretion in the matter of classification in police statutes and revenue statutes. The idea is that, if any possible reason can be conceived to justify the classification, it will be upheld."

In City of Memphis v. State, 133 Tenn 84, 179 S. W. 631, L. R. A. 1916B, 1115, Ann. Cas. 1917C, 1056, chapter 60 of the Acts of 1915, which was an act passed for the regulation of a class of motor vehicles which had, recently before the passage of the act been brought into service in the principal cities of the state, commonly known as "jitneys." The act requires that before using the streets of the city the owner should file a bond with sufficient surety or sureties for not less than $5,000 for each jitney operated, conditioned to pay any damages that might be adjudged against the jitney owner for loss of life, or injury to person or property.

The constitutionality of this act was assailed because it did not include privately owned motor vehicles, which were identical in structure, were propelled in the same way, and used alone for carrying passengers. The act was further assailed upon the ground that it did not include taxicabs, which were motor passenger vehicles performing a similar service. traveling the streets of the city, and carrying passengers for compensation the same as jitneys.

This court held that the law was valid, and concluded that the Legislature, in all probability, thought taxicabs did not use the most traveled streets, or that it might be that larger investmens were required to enter the taxicab business, and that the conveyances would be less in number. In that case this court said:

"Mathematical or logical exactness, in every aspect, in a division for classification is not always possible. and it is not required in order to validity. The best can be done is to keep within the clearly reasonable and practicable. That is accomplished where there are such general characteristics of the members of the class as to reasonably call for special legislative treatment.' "

It is well-known legislative history that in this state coal mines have been dealt with independently by the Legislature, and that many statutes have been enacted relating to coal mines that have no relation to any other industry in the state.

For illustration, chapter 24 of the First Extra Session of the Legislature of 1913, requires every operator of a coal mine to provide and keep in a convenient place at or near the mouth of said mine, and in a room where the same shall be well protected, suitable stretchers, bandages, and medicines for the first aid to the injured in and about said mine.

Another act was passed by the Legislature in 1881, which has been carried into Shannon's Annotated Code at section 3079a163, requiring every coal mine operator to provide at or near the mouth or entrance of such mine a place where men employed therein can wash and change their clothes when entering the mine or returning therefrom.

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By the act of 1881 it is also provided that all boilers used for generating steam in and about coal mines or collieries shall be kept in good order, and the owner or agent thereof shall have them examined and inspected by a competent board of boiler inspectors, as provided for in the case of steam navigation, railroads, etc., as often as once every six months and oftener if needed, and the result of such examination, under oath, shall be certified in writing to the inspector for the district; and all machinery in and about the mines, and especially in the coal breakers, where boys work, shall be properly fenced off, and the top of such shaft shall be securely fenced off by vertical or flat gates covering the area of said shaft, and the entrance of every abandoned slope and other air shafts shall be securely fenced off.

[12] Other acts could be cited, but this is sufficient to show that the Legislature, for obvious reasons, has classified coal mining in a class to itself because it is attended with risks and dangers which distinguish it from all other mining industries.

The question of unlawful classification presented by appellant in the instant case has been passed on by the Supreme Courts of other states in cases where the constitutionality of Workmen's Compensation Acts has been challenged.

In Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S. W. 556, the Supreme Court of Texas held that the exclusion of domestic servants, farm laborers, employees of any person, firm, or corporation operating any railway as a common carrier, cotton gin employees, and the employees of any person, firm, or corporation having in his or their employ not more than five employees, from the provisions of the Workmen's Compensation Act of the state of Texas did not render the act unconstitutional because of its classification. The Supreme Court of Texas, in sustaining the act, said:

"Employees of railroads, those of employers having less than five employees, domestic servants, farm laborers and gin laborers are excluded from the operation of the act, but this was doubtless for reasons that the Legislature deemed sufficient. The nature of these several employments, the existence of other laws governing liability for injuries to railroad employees, known experience as to the hazards and extent of accidental injuries to farm hands, gin hands and domestic servants, were all matters no doubt considered by the Legislature in exempting them from the operation of the act. Distinctions in these and other respects between them and employees engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary."

This case was carried by writ of error to the Supreme Court of the United States, and that court, in an opinion by Mr. Justice Pitney, said:

"There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to ther classes of employment, this would not amount to a constitutional objection." 249 U. S. 157. 39 Sup. Ct. 229, 63 L. Ed. 527.

The Maryland act was held not to be invalid as class legislation because its provisions apply only to those engaged in mining coal and clay in two designated counties. American Coal Co. v. Allegheny County, 128 Md. 564, 98 Atl. 143. The court, in sustaining the act, said that there could be no serious objection to the classification of those engaged in mining coal and clay in a group by themselves, although there are other dangerous occupations to which the law does not apply, and the re-

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striction of the law to the designated counties could prove no stumbling block to the legislation, for such local limitations are recognized as legal and proper, if all within the selected locality are treated alike and the locality itself is broad enough to work no harmful discrimination.

In Sayles v. Foley. 38 R. I. 488, 96 Atl. 340, it was held that the exclusion of domestic and agricultural employees, or casual employees, and of employees of employers of five or less workmen, did not render the Rhode Island act unreasonable and discriminatory. In that case it was also held that the exclusion from the act of employees receiving more than $1,800 per year was not an unreasonable classification, as in most employments involving considerable danger of injury from accident the employee receiving such a salary or wage may be presumed to be exposed to less danger of accident than the ordinary workman.

The Illinois act was held not to be unconstitutional upon the ground that section 31 requires an unreasonable and arbitrary classification, in that it sets apart contractors from all classes of persons, and imposes a burden upon them that if they fail to require subcontractors to insure thus arbitrarily distinguishing also one class of contractors from another class. Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976.

[13] It is next insisted that the act is violative of section 6 article 1 of the state Constitution, because it denies trial by jury. The section of the Constitution referred to provides:

"That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."

Section 32 of the act in question provides:

"The cause shall be heard by the circuit judge without a jury and as other nonjury civil cases are heard in the circuit court. Neither party shall have the right to demand a jury."

The constitutional provision above referred to only protects the right of trial by jury as it existed at common law. Trigally v. Memphis, 6 Cold. 385. Marter v. Wear, 117 Tenn. 244, 96 S. W. 447; Woods v. State, 130 Tenn. 106, 169 S. W. 558, L. R. A. 1915F, 531; State ex rel. v. Howse, 134 Tenn. 67, 183 S. W. 510, L. R. A. 1916D, 1090, Ann. Cas. 1918C, 1125.

The act in question confers rights and remedies that were unknown to the common law. The act is elective. If the employee accepts the provisions of the act, it thereby becomes a part of his contract of employment. and he waives his right to trial by jury and accepts the compensation and remedies provided by the act.

It is provided by statute that, on a failure to demand or call for a jury in the first pleading tendering an issue, or on the first day of the term at which the suit demands for trial, a jury trial is conclusively presumed to have been waived. Shannon's Code, § 4613.

A jury may be waived by parties falling within the provisions of the Workmen's Compensation Act by their voluntary acceptance of the terms of said act.

It has been invariably held that, under the voluntary or elective Workmen's Compensation Acts, parties, by accepting the act. waive the right to a jury trial; hence there is no deprivation of that right. Hawkins v. Beakley (D. C.) 220 Fed. 378 (sustaining the Iowa act); Deibeikis v. Link Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; Hunter v. Colfax Consolidated Coal Co., 175 Iowa. 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803; Greene v. Caldwell, 170 Ky. 571, 186 S. W. 648. Ann. Cas. 1918B, 604; Mathison v. Minn. St. Ry. Co. 126, Minn. 286, 148 N. W. 7, L. R. A. 1916D, 412; Sexton v. Newark Dist. Tel. Co., 84 N. J. Law. 85, 86 Atl. 451.

[14] It is next insisted that the act violates section 17 of article 1 of our state Constitution, which reads as follows:

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"That all courts shall be open; and every man, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and right and justice administered without sale. denial or delay."

It is insisted by plaintiff that the act closes the courts to him that were open prior to its passage, and denies him a remedy by due course of law.

We do not think such is the effect of the act. Section 32 provides as follows:

"That in case of a dispute over or failure to agree upon compensation under this act between the employer and employee, or the dependent of the employee, either party may submit the entire matter for determination to the judge or chairman of the county court in which the accident occurred and such judge or chairman is hereby vested with jurisdiction to hear and determine the issues and render judgment and enforce the same in the same manner as courts * * * render and enforce judgment.

"The county judge or chairman shall have power to subpoena witnesses administer oaths. * * * Either party dissatisfied with the judgment of the judge or chairman may appeal as in any other civil cases to the next term of the circuit court of the county where the case will be heard by the circuit judge de novo. * * * The party filing the petition may, at his option, instead of filing the same before the county judge or chairman file the same as an original petition in either circuit, criminal. or chancery court of the county in which the petitioner resides or in which the alleged accident happened, in which event summons shall be issued by the clerk of the court in which the proceeding is instituted, and shall be returned before said court within the time provided for proceedings before a county judge or county chairman. * * * Any party to the proceedings in the circuit, criminal, or chancery court may, if dissatisfied or aggrieved by the judgment or decree of that court, pray an appeal in the nature of a writ of error to the Supreme Court of Tennessee. where the cause shall be heard and determined in acordance with the practice governing other appeals in the nature of a writ of error in civil causes."

[15] The provision of section 17 of article 1 of our state Constitution is a mandate to the judiciary, and was not intended as a limitation of the legislative branch of the government. Bledsoe v. Wright, 2 Baxt. 471; Dodd v. Weaver, 2 Sneed. 672; Pawley v. McGlimpsey, 7 Yerg. 502.

In the case of Adams v. Iten Biscuit Co., 162 Pac. 938, the Supreme Court of Oklahoma held that the Workmen's Compensation Act of that state was not violative of a similar clause in its Constitution.

The act being optional and not compulsory, plaintiff's contention that it deprives him of a remedy given him by due course of law is not tenable. It is true that the remedy which he had prior to the passage of the act. that is, the common-law remedy, has been taken away, but this the Legislature had the power to do, as was ruled by this court in Nance v. Piano Co., 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1913D. 834. In that case this court said:

"The suggestion in briefs that the common law as it existed at the time of the adoption of our Constitution was transfixed by that event into a rigid and inflexible system of laws, which could not be changed by the Legislature, is one that is not entitled to serious consideration.

"The only relation which the system of laws in force at the time of the adoption of the Constitution has to the construction of that instrument is to furnish a definition and proper interpretation of terms used in the Constitution with reference to the system of laws. The 'law of the land,' as used in the Constitution, did not embrace as a fixed and immovable system the common law in existence at the time. It had refer-

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ence to the common and statute law then existing in this state. but this dose not mean that it is not competent for the Legislature to alter, change, or abolish the system of law in force at the time of the adoption of the Contitution, and it may do so, unless it is prohibited from so doing by the Constitution of this state or of the United States. * * * Prescott v. Duncan, 148 S. W. 229, Harbison v. Knoxville Iron Company, 103 Tenn. 421."

[16, 17] It is next said that the act violates section 8 of article 1 and section 21 of article 1 of our state Constitution. Section 8 of article 1 is as follows:

"That no man shall be taken or imprisoned, or disseized of his freehold. liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

Section 21 of article 1 reads:

"No man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

It is insisted that the act violates the foregoing provisions of our state Constitution, because it deprives the plaintiff of a property right, and takes the same without just compensation being made therefor.

Section 21 of the act reads as follows:

"Be it further enacted. that this act shall have no retroactive effect, and shall not apply to actions for accidental injury or death, occurring prior to the passage of this act, but claims for damages with respect thereto shall be redressed by the law as it stood prior to the enactment of this statute."

An employee has no property right in the common-law rules of liability applicable to relation of employer and employee prior to the occurrence of an injury, within the meaning of and as protected by the above-quoted sections of the Constitution. Nance v. Piano Co., supra; Harbison v. Knoxville Iron Co., 103 Tenn. 421, 53 S. W. 955, 56 L. R. A. 316; New York Central Railroad Co. v. White, supra; Middleton v. Light Co.. supra.

In the case of New York Central Railroad Co. v. White, supra, the constitutionality of the Workmen's Compensation Act of the state of New York was involved. The court, speeaking through Mr. Justice Pitney, said:

"The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But these rules, as guides to conduct, are not beyond alteration by legislation and the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. Munn v. Ill.. 94 U. S. 113. * * *

"The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; 'safety appliance acts being a familiar instance."

[18] It is next insisted that the act violates the Fourteenth Amendment of the federal Constitution, because it deprives the plaintiff of his property without due process of law.

This question was settled adversely to the contention of the plaintiff in New York Central Railroad Co. v. White, supra, and the Case of Arizona Copper Co. v. Hammar, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058.

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[19-21] It is next said that the act is unconstitutional, in that it undertakes to make an election for and a binding contract upon a minor employee, when, by reason of such minority, he is unable to make such election or contract.

In the caption to the act it is set forth as being one of the purposes of the act "to make minors sui juris for certain purposes,"

In section 2, subsec. b, of the act, it is provided:

"'Employee' shall include every person. including a minor, in the service of an employer, * * * under any contract of hire, apprenticeship, written or implied."

The second paragraph of section 7 of the act is as follows:

"Whenever payment is made to any person eighteen (18) years of age or over the written receipt of such person shall acquit the employer."

In section 31, subsec. 4, it is provided:

"In case of physical or mental incapacity, other than minority, of the injured person, * * * the period of limitation in any such case shall be extended for one year from the date when such incapacity ceases."

We are of the opinion that the plaintiff is not in a position to challenge the act upon the ground that it undertakes to make an election for a minor empolyee. because it is not shown that plaintiff is a minor; in fact, we do not understand that it is claimed that he is a minor, and therefore has no interest in the provisions of the act relating to minors.

However, we think there is no question as to the power of the Legislature to endow minors with the right to make contracts otherwise lawful, and after he has been so endowed he becomes, for the purpose of the act, an adult, or, at least, on the same plane. It was expressly so ruled in the case of Borgnis v. Falk Co.. 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

And it was expressly held in the case of Young v. Sterling Leather Works, 91 N. J. Law, 289, 102 Atl. 395, in which case the validity of the Workmen's Compensation Act of the state of New Jersey was challenged, that a minor has no such vested right in his disability recognized by the common law as to prevent the Legislature from constitutionally removing such disability with resepect to future contracts, and that it had the power to change the age at which the minor is privileged to exercise legal rights which should be binding on him.

[22-25] It is next said that the act is unconstitutional because it violates section 7 of article 6 of our state Constitution. This section of the Constitution is as follows:

"The judges of the Supreme or inferior courts, shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office nor hold any office of trust or profit under this state or the United States."

Section 32 of the act provides as follows:

"For acting in each of such cases which is contested or litigated the county judge or chairman of the court shall receive a fee of $5.00, which shall be taxed as a part of the costs of the case against the unsuccessful party. For entering all orders, settlements or compromises of claims which are not controverted or litigated the county judge or chairman of the county court shall receive as compensation a fee of two ($2.00) dollars, which shall be taxed equally against both parties."

The county judge is a judge of an inferior court, within the meaning of the above-quoted section of the Constitution. and his salary as judge can neither be increased nor diminished during the term for which he is elected. State v. Glenn, 7 Heisk. 472; State v. McKee, 8 Lea, 24; State v. Leonard, 86 Tenn. 490, 7 S. W. 453; Judges' Cases, 102 Tenn. 571, 53 S. W. 134.

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We are of the opinion, therefore, that this provision of the act is unconstitutional and void. but we are further of the opinion that this infirmity in the act does not affect the validity of the entire act. We think the provision allowing a fee to the county judge or chairman for acting in certain cases may be elided. It is a well settled rule of law that where the provisions of a statute are severable and distinct the unconstitutionality of one or more provisions will not vitiate those that are valid and constitutional. State ex rel. v. Trewitt, 113 Tenn. 571, 82 S. W. 480; Jones v. Memphis, 101 Tenn. 188, 47 S. W. 138. McCamey v. Cummings, 130 Tenn. 505, 172 S. W. 311; Richardson v. Young, 122 Tenn. 523, 125 S. W. 664; Malone v. Williams. 118 Tenn. 439, 103 S. W. 798, 121 Am. St. Rep. 1002.

[26] It is next said that the act is unconstitutional because of the provisions contained in section 25 thereof, which require an injured employee to submit to an examination and accept medical service, and deny to him the right of compensation so long as he refuses. Section 25 reads as follows:

"That during the thirty days after the notice required by section 23 of this act to be given the employer, or his agent, the employer shall furnish free of charge to the injured employee such medical and surgical treatment, medicine medical and surgical supplies, crutches and apparatus as may be reasonably required, and the injured employee shall accept the same. * * * The injured employee must submit himself to the examination by the employer's physician at all reasonable times if requested to do so by the employer. but the employee shall have the right to have his own physician present at such examination, in which case the employee shall be liable to such physician for his services. * * * And in case of dispute as to the injury,, the court may, at the expense of either party or on its own motion, appoint a neutral physician of good standing and ability to make an examination of the injured person and report his findings to the court, the expense of which examination shall be borne equally by the parties. If the injured employee refuses to comply with any reasonable request for examination, or refuses to accept the medical services which the employer is required to furnish. * * * his right to compensation shall be suspended and no compensation shall be due and payable while he continues such refusal. * * *

"If in an emergency or on account of the employer's failure or refusal to provide the medical care and service required by this act, the injured employee or his dependents may provide the same, and the cost thereof, not exceeding $100 shall be borne by the employer."

The plaintiff does not undertake to point out what provision of the Constitution is violated by the provisions of section 25.

We do not think it violates any section of the Cinstitution. No further discussion of said contention is necessary.

We believe that this disposes of all the specific objections urged by plaintiff to the validity of the act. We are of the opinion that the act is constitutional and valid, except as to the provisions of section 32, relating to the fees of the county judge or chairman of the court. As hereinbefore indicated, we think this provision of section 32 is invalid and should be elided, and the judgment of the circuit will be accordingly modified.

The plaintiff will be taxed with the costs of the cause.

Justice Bachman dissents. He is of the opinion that the act, exempting as it does coal mine operators and their employees from its operation, is arbitrary, discriminatory, and unreasonable because of this classification.

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UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD., v. DAVIS. (No. 9355.)

(Court of Civil Appeals of Texas, Ft. Worth. June 5, 1920. Rehearing Denied July 2, 1920.)

223 Southwestern Reporter, 700.

MASTER AND SERVANT — MISTAKE JUSTIFYING CORRECTION OF AWARD OF COMPENSATION MUST BE ONE OF FACT.

Under Workmen's Compensation Law as amended by Act March 28, 1917, pt. 1, § 12d (Vernon's Sayles' Ann. Civ. St. Supp. 1918, art. 5246—25), authorizing correction, during the compensation period, on application of any person interested showing a change of conditions, mistake, or fraud, of an award previously made, it is only a mistake of fact, and not one of law, as how much per week can be awarded for a permanent injury, which can be so corrected.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from District Court, Denton County; C. R. Pearman, Judge.

Motion by the United States Fidelity & Guaranty Company of Baltimore, insurer, for correction of judgment making award to W. W. Davis under the Workmen's Compensation Law. Motion denied, and the insurer appeals. Affirmed.

Seay, Seay, Malone & Lipscomb, of Dallas, for appellant.

E. I. Key, of Denton, for appellee.

CONNER, C. J. Appellee recovered a judgment against the United States Fidelity & Guaranty Company under our Workmen's Compensation Act, pt. 2, § 5 (V. S. Annotated Civil Statutes, Supp. 1918, art. 5246—44) for $22 per week for 264 weeks after allowing the defendant credit for $180 which it had already paid under a ruling of the Industrial Accident Board. On appeal to this court, the judgment of the trial court was, on the 22d day of March, 1919, affirmed, but, among other things, so reformed as to require the trial court to retain the case upon its docket subject to be modified, changed, or revoked at any time by the court upon application of either party showing a change of conditions, mistake, or fraud, as provided in the Compensation Law. See U. S. Fidelity & Guaranty Co. v. Davis, 212 S. W. 239.

Thereafter, on September 4, 1919, the appellant company instituted the present proceeding by a motion in the trial court, alleging that a mistake had been made in the entry of the original judgment and as reformed by this court in awarding $22 per week for 265 weeks; that the original recovery had been on the ground of permanent disability on the part of Davis, and that for injuries of that character the Compensation Act limiting recoveries at the maximum amount of $15 per week, not to exceed 401 weeks, alone applies; the contention being that section 15a, pt. 1, of the Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—34), which permits, under certain circumstances, an increase of benefits and a diminution of the number of weeks, only applies in cases where the compensation is for a definite sum and for a definite period, such as is provided in article 5246—21 for the loss of an eye, leg, etc., and not to cases where, as here, the injuries were found to be permanent.

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The trial court refused to grant the prayer of the motion, and from its order or decree to that effect that present appeal has been prosecuted.

Section 12d, pt. 1, of the act approved March 28, 1917 (General Laws 1917 [article 5246—25]), amending the Compensation Law, provides that judgments of the character originally entered in appellee's favor may, "upon the application of any person interested showing a change of conditions, mistake, or fraud," be reviewed and terminated or corrected so as to diminish or increase compensation previously awarded, etc. But in our judgment a determination of the proper application of this law is wholly unnecessary to a disposal of the present appeal. We therefore do not now feel called upon to discuss the question of whether section 15a of the amendatory act above referred to (article 5246—34, 1918 Supp. V. Stats.) permitting an increase beyond the maximum of $15 per week, to which compensation is generally limited under section 9, pt. 1. of the said amending act (article 5246—17), should or should not be applied to awards or judgments founded upon permanent injuries. That question was involved in the original judgment rendered by the trial court in appellee's favor and reviewed by us on appeal, as stated. The record on the original appeal now before us shows that that original judgment followed and was predicated upon the following verdict of the jury:

"We, the jury, find for the plaintiff as follows: A sum in 265 weekly installments of $22 per week, commencing with November 29, 1917. This in addition to $180 already paid by the defendant."

Said original record further shows that defendant, the present appellant, first requested a peremptory instruction in its favor, to the refusal of which no error was later assigned; and also requested that, in event charge No. 1 was refused, the following instruction be given:

"Gentlemen of the Jury: You are instructed that if you believe from the evidence that a manifest injustice and hardship would result to plaintiff if a certain sum of money were paid to him in weekly installments of not exceeding $15 per week, then in your discretion you may, if in your opinion the amount of compensation thus being paid a week is inadequate to meet the necessities of the plaintiff, you can increase the amount of compensation by correspondingly decreasing the amount of weeks for which the same is to be paid, allowing such discount to the defendant, increasing such payments, as in your opinion would be a just, reasonable, and fair substitute for the amount of money that would be paid at the rate of $15 per week for the number of weeks that you may find the plaintiff would be totally incapacitated from earning a livelihood, and by your verdict you should state the number of weeks that payment should be made and the amount thereof payable per week"

The instruction quoted was given by the court and evidently followed by the jury, and no objection was urged to the increase in amount of weekly compensation as found by the jury. On the contrary, appellant made a motion that judgment be entered in accordance therewith, but made flexible so as to permit correction in the event of changed conditions, mistake, etc., and the court's refusal to so enter judgment was made the basis of appellant's first assignment of error on the former appeal and the reformation made by this court on appeal was in harmony with appellant's complaint that the judgment had not been so made flexible.

It is thus apparent, we think, that the error, if any, in the judgment of the court below now complained of was not only invited by the defendant but also clearly one of law. In other words, it seems clear that the mistake, if any, made the sole basis of the present proceeding, is one of law and not of fact. and as to such mistakes we think section 12d, pt. 1, of the amending act approved March 28, 1917, above referred to. and permitting the reviews of an original award or order allowing compensation under the Workmen's Compensation Act, has no application whatever. The

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mistake in the original judgment, if any, being one of law, could and should have been corrected, if at all. upon the original appeal. It was too late thereafter on motion under the section just referred to. In 23 Cyc. p. 866, par. 2. it is said:

"A decision which is wrong in law cannot be corrected on motion, and the allowance of an amendment should never be used as a means of reviewing the judgment on the merits or rectifying judicial errors or mistakes. Thus the judgment cannot be modified or amended because as it stands it is not supported by the evidence, or because the conclusions of law on which it is founded are alleged to be erroneous, or to make it conform to what ought to have been done but was not in fact done. And when a statute authorizes the correction of judgments on the ground of 'mistake', it means mistake of fact. and not of law."

By an extension of this opinon, we could illustrate the conclusion thus noted by quotations from many of the courts, but the law, as stated in the quotation taken from Cyc., seems to be so well and so generally supported that we, in the interest of brevity, content ourselves with citing a few of our own cases in harmony with the text from Cyc. Tynbrug & Co. v. Cohen. 67 Tex. 220, 2 S. W. 734; M. P. Ry. Co. v. Haynes, 82 Tex. 448, 18 S. W. 605; Perkins v. Dunlavy, 61 Tex. 241; Hamilton v. Johachim, 160 S. W. 645.

We conclude that the court did not err in denying appellant's motion to correct the judgment, and this conclusion applies as well to appellee's cross-assignment, complaining of the court's refusal to so correct the original judgment as to award appellee his damages in a lump sum, as provided for in the Workmen's Compensation Act for permanent injuries.

Judgment affirmed.

McVICAR v. INDUSTRIAL COMMISSION OF UTAH. (No. 2498.)

(Supreme Court of Utah. June 15, 1920.)

191 Pacific Reporter 1089.

1. MASTER AND SERVANT — COMPENSATION CLAIMANT'S DEPENDENCY QUESTION OF FACT ON WHICH COMMISSION'S FINDINGS ARE CONCLUSIVE.

The issue of dependency being one of fact, the Industrial Commission's conclusions are like the verdict of a jury, and will not be interfered with, when supported by some substantial evidence, and if the commission erred in its findings of fact and conclusions, the Supreme Court cannot correct the error. Ceo. A. Lowe Co. v. Industrial Commission of Utah. 190 Pac. 934.

(For other cases, see Master and Servant, Dec. Dig. § 413[7].)

2. MASTER AND SERVANT — COMMISSION'S DECISION ON CLAIM FOR COMPENSATION FINAL, UNLESS ABUSE OF DISCRETION CLEARLY APPEARS.

Where it does not clearly and indubitably appear that the discretion of the Industrial Commission has been abused, its decision is final and unassailable.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

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3. MASTER AND SERVANT — COMPENSATION CLAIMANT'S COUNSEL, RELYING ON STIPULATION TO TAKE TESTIMONY, NEED NOT STATE TO COMMISSION WHAT HE EXPECTS TO PROVE.

The attorney for the applicant was entitled to rely on a stipulation to take further testimony, and for that reason was not required to make a statement to the Industrial Commission of what he proposed to prove by witnesses he desired to produce, and his request wrongly denied.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

Proceeding by Minnie R. McVicar under the Workmen's Compensation Act for compensation for the death of her son, James Allen McVicar, opposed by the Imperial Lead Mining Company, employer. Award for claimant by the Industrial Commission, and claimant applies for writ of of review to determine its lawfulness. Award set aside, and Commission directed to give applicant an opportunity to introduce further testimony.

George R. Freeman, of Corona, Cal., for plaintiff.

James H. Wolfe, Asst. Atty. Gen., and De Vine, Stine & Gurlliam, of Ogden, for defendants.

WEBER, J. Plaintiff applies to this court for a writ of review to determine the lawfulness of an award by the Industrial Commission. A synoptical statement of the salient facts as found by the commission is:

Applicant (hereinbefore referred to as plaintiff) is a widow, the mother of James Allen McVicar, who was killed on September 12, 1919, while employed by the Imperial Lead Mining Company. in what is known as Death Canyon, Utah. The husband of the applicant died about two months following the demise of the son. For approximately one year prior to the death of the husband he had not been able to earn anything, and had made no contribution toward the support of the applicant, his wife. The deceased son had been discharged from service in the United states navy during the latter part of 1918. He lived with his parents and contributed to their support after he was discharged from the navy and until he went to work in Utah about June 12, 1919. During the time he had been so employed he had contributed to the support of his father and mother the sum of $90. The applicant had no idea, according to her testimony, of what her household expenses were. She had no systematic method of buying supplies for the household, and no way in which to estimate what her receipts from the deceased son were, other than that he contributed everything. The evidence very clearly shows that the deceased did not contribute everything at any time toward the support of the applicant or her husband.

During the time the son was in the navy he made an allotment for the support of his father and mother of $15 per month, which was increased by an allowance from the government of $10. The amount of any support contributed by the deceased son prior to his entry into the service was not ascertained. His contribution after his return from the navy was not ascertained with any degree of certainty. During the first part of 1919 he was employed by the Riverside Portland Cement Comapny, living in Riverside with his parents, who had apartments there. The rent for the apartment was paid by the applicant. In all probability, during that period the deceased son contributed the entire support of the applicant other than this $25 per month; but it does not appear that the contribution toward the support of applicant at any time amounted to more than $25 per month.

The commission ordered that compensation be awarded, to be paid by the Imperial Lead Mining Company. to the applicant at the rate of $16 per week for a period of 112 weeks and 3 days, but not to exceed $1,800, and that the undertaker be paid the sum of $150.

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[1, 2] The record is not without evidence to support the findings and conclusions of the commission. The issue of dependency being one of fact, the commission's conclusions are like the verdict of a jury, and will not be interfered with by this court, when supported by some substantial evidence. If the commission erred in its finding of fact and conclusions. we cannot correct the error. It has the power to determine the degree of dependency. Since it does not clearly and indubitably appear that the discretion of the commission has been abused, its decision is final and unassailable. The principles enunciated in Geo. A. Lowe Co. v. Industrial Commission of Utah, 190 Pac. 934, are applicable here.

[3] If the applicant had been given an opportunity to present all her testimony, the award would be affirmed. The depositions of certain witnesses on behalf of applicant were taken February 18, 1920, and at that time it was stipulated between the attorneys for the parties that a further hearing might be held at the desire of either party. On February 18, 1920. applicant's attorney informed the commission by letter that he desired to take testimony of several witnesses, and that their testimony would relate to the amount of compensation received by James Allen McVicar immediately prior to his death, and also the amount of money sent to his mother; also as to statements made by the son relative to his mother being dependent upon him. On March 13, 1920, counsel for applicant again wrote to the commission, calling attention to his former letter, and saying that he desired to take the deposition of a certain witness. Neither of these letters was answered by the commission. On March 25, 1920, the award herein was rendered. In an application for rehearing, filed in due time, the refusal to permit applicant to introduce further testimony was given as one of the grounds for rehearing; the stipulation and letters being made a part of the application. The application for rehearing was denied May 20, 1920.

In his letters to the commission counsel for applicant did not state what he expected to prove by the witnesses whose testimony he desired to produce. He relied upon the stipulation to take further testimony, and for that reason he was not required to make a statement of what he proposed to prove. He was justified in relying upon the stipulation, and his request to introduce further testimony should have been granted.

The award is therefore set aside, and the commission is directed to give applicant an opportunity to introduce further testimony.

Corfman C. J., and Frick, Gideon, and Thurman, JJ., concur.

VAROUKAS v. INDUSTRIAL COMMISSION OF UTAH et al. (No. 3490.)

(Supreme Court of Utah. July 21, 1920.)

191 Pacific Reporter 1091.

1. MASTER AND SERVANT—INDUSTRIAL COMMISSION MAY ADOPT REASONABLE RULES CONFORMING TO COMPENSATION ACT.

The Industrial Commission has power to promulgate rules and regulations to protect the injured employee, the employer, the insurance carrier, and to safeguard the state insurance fund, provided such rules are reasonable and conform to the spirit of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

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2. MASTER AND SERVANT — INDUSTRIAL COMMISSION'S RULE HELD UNREASONABLE AND CONTRARY TO COMPENSATION ACT.

Industrial Commission's rule No. 19, requiring injured employee to procure the commission's consent to leaving the locality of employment. and providing for forfeiture of full compensation accruing after employee has left locality without such consent, without any hearing and regardless of whether absence in any way affected his disability, is unreasonable, the commission having no right to forfeit any part of the compensation allowed by Workmen's Compensation Act, except after notice and hearing and for good cause.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

3. MASTER AND SERVANT — COMPENSATION CLAIMANT VIOLATING COMMISSION'S RULE HAS BURDEN OF PROOF.

Injured employee entitled to compensation under Workmen's Compensation Act, who has left locality of employment without Industrial Commission's consent, in violation of its rules, has burden of showing that he had good cause for failure to procure consent, and that absence has not prejudiced employer or insurance carrier or state insurance fund. and did not prolong period of disability.

(For other cases ,see Master and Servant, Dec. Dig. § 403.)

4. MASTER AND SERVANT—COMPENSATION TO EMPLOYEE VIOLATING RULES OR DISOBEYING PHYSICIAN'S ORDERS LIMITED TO DISABILITY ORDINARILY RESULTING FROM INJURY.

Where employee violates a rule of Industrial Commission or disobeys the orders of the attending physician, or otherwise arbitrarily refuses to cooperate with those in attendance upon him, the award of compensation under Workmen's Compensation Act should cover only such a period of incapacity or disability as would usually and ordinarily result from the character of the injury received by the employee.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

5. MASTER AND SERVANT — COMPENSATION CLAIMANT MUST TAKE NOTICE OF INDUSTRIAL COMMISSION'S RULES.

Injured employee, on making application to Industrial Commission for compensation under Workmen's Compensation Act, is bound to take notice of the rules and regulations of the commission affecting the application.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

Proceedings under Workmen's Compensation Act by Louis Varoukas for compensation for injuries, opposed by the Standard Coal Company, employer. Award by Industrial Commission of Utah for claimant, and on denial of his application for additional compensation, he presents the record to the Supreme Court for review. Decision of Commission annulled, and cause remanded, with directions.

Stewart, Alexander & Cannon, of Price, for plaintiff.

Dan B. Shields, Atty. Gen., James H. Wolfe, Asst. Atty. Gen., and A. R. Barnes, of Salt Lake City. for defendants.

FRICK, J. Plaintiff, in due time and in due form, made application to the Industrial Commission of Utah, hereinafter styled commission, for compensation under our statute for a disability caused by injuries which

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he sustained in the course of his employment while in the employment of the Standard Coal Company of Utah. The commission, after a hearing, awarded plaintiff "compensation for the disability period. January 10, 1919, to Febraury 20, 1919, less the 10 days waiting period," amounting to $54.81. The plaintiff was dissatisfied with the award of the commission, for the reason, as he contends, that the disability period fixed by the commission was for a shorter time than the disability continued, and he asked for a rehearing. In the petition for a rehearing he asked for additional compensation, which additional compensation, however, was denied for the reasons hereinafter appearing. The majority of the commission on the first hearing, after citing the facts, closed its decision as follows:

"From the evidence, therefore, the commission finds that the applicant met with an accident and sustained injuries arising out of and in the course of his employment, and that there followed a total dsability period from January 10, 1919, to February 20, 1919, for which compensation should be allowed. The commission finds that the disability period extended beyond the 20th of February, 1919, but that compensation may not be allowed for this period on account of the violation of rule 19. The commission feels that this is a reasonable rule which must be respected. In this case the evidence shows that the defendant furnished, and was willing to furnish, all necessary medical attention, and it is conceded that where the defendant is willing to do this it should have the right to so do, and this right should not be interfered with by the employee without reason and without notification to any one taking his departure from the locality.

Wherefore it is ordered, adjudged, and decreed that the applicant be, and he is hereby, awarded compensation for the disability period, January 10, 1919, to February 20, 1919, less the 10 days' waiting period, or 31 days, or $54 81."

In denying the application for additional compensation the commission merely adhered to the reasons originaly given, and the plaintiff presents the record to this court for review.

Rule 19 which is referred to in the decision of the commission, and pursuant to which it refused to allow plaintiff additional compensation, reads as follows:

"An injured employee who desires to leave the locality in which he or she has been employed during the treatment of his or her injury or desires to leave the state, shall report to his or her attending physician for examination, notifying the commission in writing of such intention to leave, accompanying notice with a certificate from the attending physician, setting forth the exact nature of the injury, the condition of the employee, together with a statement of the probable length of time disability will continue. After complying with the requirements herein set forth and upon written consent of the commission, the employee may leave the locality in which he or she has been employed, otherwise no compensation will be allowed during such absence from the locality in with he or she has been employed."

[1] Plaintiff's counsel vigorously assail the findings and conclusions of the commission and further insist that it was without power or authority to adopt rule 19. They contend, however, that if it be conceded that the commission possessed such power, yet said rule is unreasonable. and for that reason the rule is without force or effect. Without pausing now to point out the particular powers that are conferred on the commission with regard to adopting and promulgating rules and regulations, we are clearly of the opinion that the commission has ample power to promulgate all reasonable rules and regulations for the protection of those who are injured, and also to protect the rights of the employer, and that of the insurance carrier, and may safeguard

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the state insurance fund. The rules that are promulgated, however, must be reasonable, and must conform to the spirit of the Compensation Act (Laws 1917, c. 100, as amended by Laws 1919, c. 63).

In view of its decision and the evidence, which is certified to this court by the commission, the only uestion we can consider here is the reasonableness of rule 19.

[2] It will be observed that according to the provisions of rule 19 the employee is permitted to leave the locality in which he was employed only after he has complied with those requirements, "and upon the written consent of the commission, * * * otherwise no compensation will be allowed during * * * the absence of the employee from the locality in which he has been employed." The rule is absolute and inflexible to the effect that if the employee leave the locality of his employment without complying with its requirements and without the written consent of the commission "no compensation will be allowed during" such absence. The employee thus forfeits all compensation regardless of the cause which may have induced or required him to leave the locality of his employment. It will also be observed that the forfeiture is imposed without giving him a hearing so far as the rule is concerned. As a matter of course, if the commission may forfeit all compensation merely because the rule is disregarded, no hearing is necessary. We are of the opinion, however, that the commission may not forfeit any part of the compensation which it alowed by our statute, except after notice and hearing and for good cause. No doubt the rule in its general tenor and effect is proper and salutary. In view that the employer under the statute is required to compensate the injured employee during his entire disability and the commission in all cases is required to determine and fix the period of disability, it is but just and fair, even necessary, that the employee shall comply with all reasonable rules and regulations which are intended to protect the employer, the insurance carrier, and the state insurance fund against spurious or fanciful claims on the part of the employee and that the employee remain within the reach of the commission at all times during his disability. It is a matter known to all, however, that an employee, like many other persons, may suddenly be called on to leave the locality of his employment upon a call from his home in case of serious illness or death of one of his family or kinsman, or for some other unavoidable reason, and in order to respond to the call effectually it may be utterly impossible to first obtain the written consent of the commission, or even make a report to the attending physician on account of his absence or for some other reason. Under the rule as it is written, however, and as it is applied in this case, a forfeiture would result whether the employee had left the locality with or without cause. Such a rule, in our judgment, is contrary to the spirit of the Compensation Act, for the reason that its enforcement under certain circumstances must result in forfeiting compensation which may be justly due to the employee.

[3] We also unhesitatingly state that in case the employee leaves the locality of his employment the burden should be cast upon him to show why his absence has not prejudiced his employer, or the insurance carrier, or the state insurance fund, as the case may be, and that such absence did not prolong the period of his disability. In case he has violated the rule, the burden of proof and the duty to explain should be on him, and unless he satisfies the commission that his absence without its consent has in no way resulted in prejudicing the employer, insurance carrier, or the state insurance fund, the commission should deny him compensation for such period as may be just and proper in view of the established facts. A forfeiture should, however, not be declared without giving the employee a hearing if he desires to be heard. Upon such a

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hearing he may produce the most cogent reasons, as before suggested, why he did not and could not comply with the rule. If the commission is convinced that by his absence the period of disability was not materially increased and the final recovery of the employee retarded, justice demands that no part of his compensation be forfeited.

[4] Neither do we dispute the contention of counsel for the coal company that in case an employee violates a rule or disobeys the orders of the attending physician, or otherwise arbitrarily refuses to co-operate with those in attendance upon him the award or compensation should recover only such a period of incapacity or disability as would usually and ordinarily result from the character of the injury received by the employee. These things are discussed in 1 Honnold, Workmen's Compensation, § 134, under the heading of "Aggravation of Injury after Accidents." What we contend for here is not that the employee shall not comply with the rules of the commission, or that he may refuse to obey the orders of the attending physician. or. that he may be guilty of such conduct as will tend to increase or prolong his period of disability, but what we insist upon and what we hold is that rule 19, if literally enforced, must necessarily result in forfeiting compensation without giving the injured employee an opportunity to explain or to prove that his conduct was not willful or contumacious or that he willfully violated any rule, or that it did not prolong his disability. In 1 Honnold, Workmen's Compensation, § 188, at page 680, the author. in discussing the duties of injured employees, says:

"Compensation is not payable for such portion of the illness as is due to the injured employee's own actions aggravating his disability. *But, in justice to the patient, the commission will require the fact of insubordination, lack of co-operation with the physician, or reprehensible conduct to be clearly established before it will sanction the cutting off of the treatment and the compensation payments allowed by law.*" (Italics ours.)

That is precisely what we insist upon here. If rule 19 made provision for a hearing in which the employee would be permitted to explain the cause of his absence or to prove that it in no way increased the period of disability, and the commission should find against him, and there were any substantial evidence in support of the finding, we should not interfere. That is not the question here, however. Under rule 19 as written the commission may forfeit all compensation which accrues after the employee has left the locality of his employment without any hearing whatever, and for the sole reason that he has left the locality, whether for good cause or for no cause, or whether it has affected in any way his disability or not. That is the precise construction that the commission has placed upon the rule. as is manifest from it decision. A rule having such an effect is, in our judgment, clearly and necessarily, not only unreasonable, but is contrary to the spirit of the Compensation Act, since it may be applied so as to cause the employee to forfeit a substantial part of his compensation without an adequate or any cause.

By what we have said we do not wish to be understood as holding that the commission in this case, in denying plaintiff additional compensation, when the facts are ascertained, may not be correct. It may well be that the plaintiff is not entitled to additional compensation both because his disability did not extend beyond that time and because he, without cause, has refused to obey the orders of the attending physician and the rules of the commission, and has thereby either increased or prolonged his disability, or has brought about conditions such that the fact cannot be established to the satisfaction of the commission. The commission should, however, hear the evidence, and then find the facts, so that in case the employee contends that there is no substantial evidence

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justifying the findings of the commission, he may have the same reviewed as in other cases.

[5] There is nothing in plaintiff's contention that in view that he had no knowledge of rule 19 therefore he is not bound thereby. It would be strange doctrine indeed if it were held that one may invoke the aid of a court, board, tribunal, or commission, and yet need not take notice of the rules and regulations governing the subject-matter of his application, and that he is not required to conform thereto, and is not bound thereby. When plaintiff made application for compensation to the commission he was bound to take notice of its rules and regulations affecting that application. In view, however, that pursuant to the provision of rule 19 the commission, without cause, other than the naked fact that plaintiff had left the locality of his employment, has forfeited all compensation accruing after he so left such locality without the written consent of the commission, that portion of rule 19 is held unreasonable and contrary to the spirit of the Compensation Act, and hence not enforceable.

The decision of the commission, denying plaintiff compensation after he left the locality of his employment, is therefore set aside and annulled, and the cause is remanded to the commission, with directions to hear evidence, if any offered upon that subject, and make findings in accordance with the evidence, and upon such findings base its conclusions whether under the evidence the plaintiff is or is not entitled to additional compensation; and to amend rule 19 so as to make it conform to the views herein expressed. Plaintiff to recover costs.

Corfman, C. J., and Weber, Gideon, and Thurman, JJ., concur.

LUBY v. INDUSTRIAL INS. COMMISSION OF WASHINGTON. (No. 15818.)

(Supreme Court of Washington. August 10, 1920.)

191 Pacific Reporter 855.

MASTER AND SERVANT—COMPENSATION ACT HELD TO EXCLUDE EMPLOYEES OF INDEPENDENT CONTRACTOR ENGAGED IN MAINTAINING INTERSTATE RAILROAD.

An employee is not entitled to compensation under the Workmen's Compensation Act, as amended in 1917 (Laws 1917. p. 96), § 19, for injuries received while engaged in cleaning and painting bridges, situated in the state on the line of a railroad engaged in interstate commerce, although working for an independent contractor, and not directly for the railroad.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

En Banc.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Proceeding by Mary Jane Luby under Workmen's Compensation Act to obtain compensation for the death of her husband, John A. Luby, opposed by August Gerske. the employer. There was an award of the Industrial Insurance Commission, denying compensation, and, from a judgment of the superior court dismissing her complaint, brought in review of the order of the Industrial Insurance Commission, the applicant appeals. Affirmed.

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Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, all of Tacoma, for appellant.

Allen, Winston & Allen, of Spokane, amici curiae.

Lindsa L. Thompson, of Olympia, for respondent.

FULLERTON, J. This is an appeal by the plaintiff, Mary Jane Luby, from a judgment entered by the superior court of Lewis county, dismissing her complaint, brought in review of an order of the Industrial Insurance Commission. The commission appeared by general demurrer, which the trial court sustained, entering the pudgment appealed from after the plaintiff had elected to stand on her complaint and had refused to plead further. The ultimate question before us therefore is, Does the complaint state facts sufficient to constitute a cause of action?

The facts stated in the complaint are, in substance, these: On May 26, 1919, the Director General of Railroads, then operating the lines of the Northern Pacific Railway Company under the provisions of the federal statute relating to government control and operation of railroads entered into a contract with one August Gerske, of Chicago, Ill., by the terms of which Gerske for a stated consideration agreed to clean and paint some 25 bridges situated on the line of the railroad of the railway company named within the state of Washington. The contract provided that Gerske should personally superintend the work, that he should furnish all of the labor and materials necessary for carrying it on, should have full control of all the employees engaged upon it and should be solely responsible for any liability which might arise because of personal injuries suffered by any of the workmen whom he should employ upon it.

After entering into the contract Gerske came to the state of Washington for the purpose of entering upon its performance. He brought with him from Chicago a number of experienced bridge painters to perform the labor of painting, among whom was John A. Luby, the husband of the plaintiff. After reaching the state and before entering upon the work, Gerske, communicated in writing with the Industrial Insurance Commission, in which he stated to them the nature of his contract and the fact that he was about to commence work thereunder, and inquired whether the work came within the provisions of the Workmen's Compensation Act (Laws 1911. p. 345). He was informed that it did, and thereupon returned to the commission an estimate of his pay roll, and paid into the state treasury the percentage thereof required by that act.

Gerske thereupon entered upon the performance of his contract, and while engaged in cleaning and painting a bridge extending over the Shehalis river in Lewis county, his employee, Luby, fell therefrom. receiving injuries from which he died a short time later. Due proofs of the death, and the cause thereof. were made to the Industrial Insurance Commission in the manner prescribed by their rules.

The bridge from which Luby fell was a bridge included within the contract of Gerske, and formed at the time of the work a part of the line of railway of the Northern Pacific Railway Company, and was then being used in the operation of trains carrying both interstate and intrastate passengers and freight.

In due time the plaintiff, as the widow of John A. Luby, on behalf of herself and her minor children, filed a claim with the Industtrial Insurance Commission for compensation for the death of her husband, under the provisions of the Workmen's Compensation Act. The claim was rejected for the stated reason that—

"August Gerske, the employer of John A. Luby, and the men employed by said Gerske, including said John A. Luby, in the work of painting bridges on said line of railroad, were engaged in interstate commerce, and were not therefore under the scope and provisions of the Workmen's Compensation Act of the state of Washington."

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The trial court rested his decision on the authority of the case of State v. Bates & Rogers Construction Co., 91 Wash. 181, 157 Pac. 482, and the learned counsel representing the plaintiff concedes in his brief that if the court is to adhere to the principle of that case it is conclusive against the plaintiff's right of recovery, devoting an argument to a showing that the case was incorrectly determined. But the trial court in its decision does not notice the very radical change in the statute made by the Legislature susbsequent to the decision of the case cited and prior to the transaction out of which the present controversy arises. This change we think presents a vital question in the case and requires an affirmative of the judgment, regardless of any conclusion that may be reached on the question of the soundness or unsoundness of the cited case.

The section of the Industrial Insurance Act which the court had in review when the decision cited was rendered is found at 6604—18 of the Code (Rem.), an reads as follows:

"The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state may, with the approval of the department, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances with the department. Such acceptances, when filed with and approved by the department, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Payment of premium shall be on the basis of the pay roll of the workmen who accept as aforsaid."

The court, in the case cited, construed this statute as exempting from the operation of the act all employers and workmen engaged in interstate or foreign commerce for whom a rule of liability or method of compensation had been established by the Congress of the United States, and held that such a rule of liability had been established by the Congress by the fifth setcion of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). From this the conclusion was drawn that since the facts of the case disclosed that the work involved therein was work in repair of a railroad bridge used by a railroad company in the carriage of interstate commerce, the workmen were without the provisions of the act, notwithstanding they were not direct employers of the railroad company, but employers of an independent contractor.

The amendatory statute referred to is found in the act of the Legislature of 1917 (Laws of 1917, c. 28, p. 96, ; 19). It provides that the section of the statute above cited shall be amended to read as follows:

"Inasmuch as it has proved impossible in the case of employees engaged in maintenance and operation of railways doing interstate, foreign and intrastate commerce, and in maintenance and construction of their equipment, to separtate and distinguish the connection of such employees with interests of foreign commerce from their connection with intrastate commerce, and such employees have, in fact, received no compensation under this act, the provisions of this act shall not apply to work performed in the maintenance and operation of such railroads or performed in the maintenance or construction of their equipment, or to the employees engaged therein, but nothing herein shall be construed as excluding from the operation of this act railroad construction work, or the employees engaged thereon: Provided, however, that common carriers by railroad engaged in such interstate or foreign commerce and in intrastate commerce shall, in all cases where liability does not exist under the laws of the United States, be liable in damages to any person suffering injury while

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employed by such carrier, or in case of the death of such employee to his surviving wife and child, or children, and if no surviving wife or children, then to the parents, sisters, or minor brothers, residents of the United States at the time of such death and who were dependent upon such deceased for support, to the same extent and subject to the same limitations as the liability now existing, or hereafter created, by the laws of the United States governing recoveries by railroad employees injured while engaged in interstate commerce."

This section, it will be observed, especially and in direct terms provides that the provisions of the Industrial Insurance Act shall not apply to work performed in the maintenance of railroads engaged in interstate, foreign, and intrastate commerce, nor to employees in such work. It makes no distinction with regard to the manner in which the railroad company performs the work; that is, whether it performs the work directly by employees hired and paid by it, or whether it performs the work through an independent contractor, who undertakes the work for a stated consideration with the understanding and agreement that he is to employ and pay for the necessary laborers—in either event the employees are without the provisions of the act. In other words, it is the character of the work that excludes, not the method by which the work may be performed.

The facts in the record show that the unfortunate workman for whose death compensation is claimed was at the time of his death employed in maintenance work upon a railroad engaged at the time in interstate, foreign, , and intrastate commerce. This is not only the necessary conclusion from the recitals of the facts contained in the complaint, but it is also made a direct and positive allegation thereof. They show further that he was employed, and his death occurred after the enactment of the statute of 1917. The plaintiff's rights therefore must depend upon that statute, and cannot be affected in any manner by the construction this court may have given to the former one which it supersedes. The question therefore whether the cited case was correctly or incorrectly decided is moot in so far as the present controversy is concerned, and no useful purpose would be subversed by entering upon snch an inquiry.

The applicant's counsel, as well as the Attorney General, appreciating the difference in the statutes, calls attention to the fact that the exclusion of railway employees from the benefits of the provisions of the Industrial Insurance Act will result in relegating them in many instances to a common-law action to recover for inuries received by them in which the common-law defenses will be applicable on the part of employers, and argues that a better construction of the statute than the one we have indicated would be to hold that the extemption applies only in those instances where the workman is in the immediate employment of the railroad company, and not in instances where he is the employee of an independent contractor. But while we appreciate the human side of the argument, it is not our opinion that the statute is of doubtful meaning, and thus open to interpretation. We cannot read it otherwise than that the Legislature has thereby exempted from the operation of the Industrial Insurance Act all employees engaged in maintenance work upon railroads engaged in interstate and intrastate commerce without regard to the fact whether they are employed to perform the work by the railway company itself or by an independent contractor. For the court therefore to read into the statute such an exception would be to legislate and not to construe.

The judgment is affirmed.

Holcomb, C. J., and Main, Mount, Mitchell, Tolman, Parker, Mackintosh, and Bridges, JJ., concur.

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HINES, DIRECTOR GENERAL OF RAILROADS, v. DAHN. (No. 5514.)

(United States Circuit Court of Appeals, Eighth Circuit. August 2, 1920.)

267 Federal Reporter, 105.

4. MASTER AND SERVANT — COMPENSATED FEDERAL EMPLOYEE CAN DERIVE NO PERSONAL BENEFIT FROM RECOVERY FROM WRONGDOER.

Under the federal Employees' Compensation Act (Comp. St. §§ 8932a–8932uu), requiring an employee receiving compensation thereunder to assign to the government his claim against another person for injuries, or requiring the application of any sums acquired by him to the payment of compensation, the employee who recovers compensation can receive no personal benefit from a recovery against another person who caused the injury.

(For other cases, see Master and Servant, Dec. Dig. § 389).

5. MASTER AND SERVANT—FEDERAL EMPLOYEE ELECTING TO RECEIVE COMPENSATION CANNOT RECOVER FOR NEGLIGENCE OF DIRECTOR GENERAL.

A mail clerk employed by the United States, electing to receive compensation under the federal Employees' Compensation Act (Comp. St. §§ 8932a–8932uu) for injuries caused by the negligence of the Director General of Railroads, cannot thereafter recover against the Director General, though he might have elected to recover from the Director General, instead of applying for compensation.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by Arthur J. Dahn against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to dismiss the complaint.

See, also, 256 Fed. 549.

F. H. Helsell, of Ft. Dodge, Iowa (C. A. Helsell, of Ft. Dodge, Iowa, W. S. Horton, of Chicago, Ill., and Nelson & Duffy, of Dubuque, Iowa, on the brief), for plaintiff in error.

W. A. Smith, of Dubuque, Iowa (D. J. Lenehan and L. G. Hurd, both of Dubuque, Iowa, on the brief), for defendant in error.

Before Sanborn and Carland, Circuit Judges, and Trieber, District Judge.

CARLAND, C. J. Defendant in error, hereafter plaintiff, brought this action against Illinois Central Railroad Company and the Director General of Railroads, hereafter defendant, to recover damages for personal injuries alleged to have been caused by the negligent operation of said railroad. Plaintiff recovered a verdict against the defendant, the action having been dismissed as to the railroad company. Defendant brings error.

The first contention made by counsel for defendant is that the plaintiff cannot maintain this action, for the reason that it is in legal effect an action against the United States, and the plaintiff as an employee of the United States had prior to the commencement of the action applied for and received the benefits of an act to provide compensation for employees of the United States suffering injuries while in the performance

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of their duties. 39 Stat. 742 (Comp. St. §§ 8932a–8932uu). The facts material to this contention as they appear in the record are as follows: On May 29, 1918, plaintiff was a railroad mail clerk engaged in the performance of his duties as such while riding in a mail car composing a part of train No. 11, of the Illinois Central Railroad Company, then running over the track of said company, under the management and control of defendant. On said date and while he was so engaged said train was derailed and wrecked by plunging through a bridge composing a part of the roadbed of said Illinois Central Railroad Company, near Aplington, Iowa, and by reason thereof he was seriously and permanently injured. Division V of defendant's answer contains the following allegation:

"That under the act for compensation for the employees of the United States aforesaid, this plaintiff has made application in the manner provided by said act for compensation under said act, and this defendant is informed and believes and charges that such application has been affirmatively acted upon and said employee has the benefit of all the provisions of said Compensation Act."

This allegation of the answer was admitted by paragraph 3 of plaintiff's demurrer to said answer, the demurrer being sustained. In subdivision 2 of said paragraph 3 in addition to the formal demurrer plaintiff also stated:

"That even if it be true that plaintiff has been paid compensation under the act to provide compensation for employees of the United States, such fact does not constitute any defense to this action, said act not purporting to furnish an exclusive remedy to plaintiff, but on the contrary, expressly providing for the maintenance of an action of this character."

On the record as it stands, and in view of the fact that at the trial the case was treated by court and counsel as if the plaintiff had applied for and accepted the benefits of the Compensation Act above referred to, the case must be treated here in the same way. The first question therefore to be considered, is: Was plaintiff's action in legal effect one against the United States?

[1] By chapter 418, 1st Sess. 64 Cong., approved August 29, 1916 39 Stat. 645 (Comp. St. § 1974a), it is provided;

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Pursuant to the authority thus given, the President on December 26, 1917 (40 Stat. 1733), issued a proclamation containing the following language:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, tele-

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graph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation, to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment to the exclusion so far as may be necessary of all other traffic thereon, and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

"It is hereby directed that the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. * * *

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

On March 21, 1918, Congress passed an act generally known as the Federal Control Act, being chapter 25, 2d Sess. 65th Cong. 40 Stat. 451 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p). Among other provisions of said act are the following:

Section 1 (section 3115¾a): "That the President, having in time of war taken over the possession, use, control, and operation * * * of certain railroads and systems of transportation (called herein carriers)." "That any railway operating income accruing during the period of federal control in excess of such just compensation shall remain the property of the United States."

Section 6 (section 3115¾f): "That the sum of $500,000,000 is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may be used by the President as a revolving fund for the purpose of paying the expenses of the federal control."

Section 10 (section 3115¾j): "That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court and action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control."

Section 12 (section 3115¾*l*): "That moneys and others property derived from the operation of the carriers during federal control are hereby declared to be the property of the United States. Unless otherwise di-

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rected by the President, such moneys shall not be covered into the treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before federal control."

Act Feb. 28, 1920, § 206g, 262 Fed. 340, reads as follows:

"No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under federal control."

The first provision quoted above from the Federal Control Act recites that the President, having in time of war taken over the possession, use control and operation of certain railroads and systems of transportation, called herein carriers, and thus makes it plain in our opinion that Congress correctly interpreted the original authority given the President, and also his proclamation to the effect that it was the physical railroads and systems that the President took possession of, and the Federal Control Act declares that these physical railroads and systems shall be called in said act "carriers." The original authority of the President authorized him to take possession and assume control of any system or systems of transportation. In his proclamation the President declared that he did take possession of each and every system of transportation and the appurtenances thereof. In view of the language conferring the original authority of the president and the language of the proclamation, the word "railroads," in the Federal Control Act, must be construed to mean the same thing as systems of transportation.

We do not think there can be any doubt about the meaning of the words "railroads and systems of transportation" as used in the several acts of Congress and the proclamation of the President. In our judgment they refer only to the physical properties which constituted the system or systems. The system is composed of the roadbed, tracks, engines, cars, and other appurtenances which are used in the transportation of passengers and freight from one place to another. The system is entirely distinct from the corporate entity which may own or manage the system. The President had no authority, nor did he pretend by the language of his proclamation, to take over the railroad corporation or corporations, which owned the several systems. The whole Federal Control Act is opposed to any such interpretation, because it provides for the payment to the different corporations of a compensation for the use of the several systems and elaborate provisions are made for the protection of the rights of both parties. The United States owned no railroad stock and did not seek to obtain control of the railroad corporations. The fundamental idea underlying the decision of the United States to take control of the systems was that it was necessary so to do in order that the great task of transporting troops, munitions, and supplies might be carried on by the different systems to the exclusion of all other traffic if necessary. Any further control than to accomplish this object was not needed, sought, or obtained. The excerpt above quoted from the proclamation of the President, to the effect that no attachment by mesne process or execution should be levied on or against the property used by any of said transportation systems in the conduct of their business as common carriers, but that suits might be brought by and against such carriers and judgment rendered as hitherto until and except so far as said Director General might by general or special orders otherwise determine clearly uses the word "carriers" as meaning the same as transportation systems, because it was only such systems whose property could not be levied on without the written assent of the Director General.

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Whoever has the management, control, and operation of a transportation system which is engaged as a common carrier in the transportation of passengers and freight from one place to another is the carrier, so far as liability is concerned for negligent operation.

[2] When we come to section 10 of the Federal Control Act, we think that there ought not to be the confusion and want of harmony in the decisions in regard to its meaning, which seems to exist as to the question now being considered. The Federal Control Act starts out by plainly declaring that the railroads and systems of transportation which the President had taken possession of should in said act be called "carriers." According to section 10, the "carriers"—that is, the physical railroad systems—shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of the act, or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law, and in such suits no defense shall be made upon the ground that the carrier transportation system is an instrumentality or agency of the federal government. To decide that the words "carrier" and "carriers," in section 10, mean the corporate entity, in the present case the Illinois Central Railroad Company, is not only to go in opposition to the plain provision of law conferring authority upon the President and the plain words of his proclamation, but also to what Congress has decided to be the true meaning of the words. It seems plain to us that the President had authority and did, through Newton D. Baker, Secretary of War, take posession and assume control of each and every system of transportation and the operation thereof; that the possession, control, operation, and utilization of such transportation systems undertaken by the President was directed by him to be exercised by and through the Director General. It would be unconstitutional and contrary to the law of the land to hold that the railroad corporation, in this case the Illinois Central Railroad Company, as a corporate entity should be liable for an act done or omitted to be done in the operation of the transportation system by another party over which it had no authority or control. Zeigler v. S. & N. A. R. R. Co., 58 Ala. 594; Mobile Light & R. R. Co. v. Copeland & Sons, 15 Ala. App. 235, 73 South. 131; Bank of Columbia v. Okley, 4 Wheat. 235, 4 L. Ed. 559; Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232; Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599; Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597; 6 Rul. Cas. Law, pp. 433, 446, embracing paragraphs 430 to 442 on Constitutional Law.

Moreover section 206g, supra, Act Feb. 28, 1920, specially provides no execution shall issue against the property of the carrier (corporation), when the cause of action on account of which the judgment was obtained grew out of federal control. We think the effect of section 10, so far as the bringing of suits is concerned, was to waive the sovereignty of the United States so far as any suits that were authorized to be brought were concerned and to allow persons injured through negligence of the carrier which in the present and similar cases would be the Director General, to bring suits against the carrier the same as if the transportation systems were not under federal control. If it was the corporate entity, in this case, the Illinois Central Railroad Company, which was to be liable for the negligence of the Director General, why did Congress provide in the Federal Control Act and the President in his proclamation

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that no execution should issue on the judgment? This is a provision not found in legislation in regard to litigation between private parties, but in litigation between private patries and the sovereignty, extending also to cities and other corporations exercising governmental functions. We are of the opinion that the present action was one in effect against the United States and that they will be obliged to pay the judgment below if sustained. The Director Genearl is sued the same as a receiver. He is not personally liable, but the government is.

[3] General Order No. 50, promulgated by the Director General, October 28, 1918, directing that actions at law. suits in equity and other proceedings thereafter brought in any court based on contract binding upon the Director General, claim for death or injury to person, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General, which action, suit or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General, and not otherwise, is an interpretation of the laws regulating Federal Control of Railroads by that department of the government charged with the duty of executing the same, and such interpretation has always been regarded by the courts with great respect. U. S. v. Cerecedo Hermanos y Compania, 209 U. S. 338, 28 Sup. Ct. 532, 52 L. Ed. 821. There are well-reasoned cases in the federal courts sustaining the views herein expressed. They are Rutherford v. Union Pac. (D. C.) 254 Fed. 880; U. S. v. Kambeitz (D. C.) 256 Fed. 247; Mardis v. Hines (D. C.) 258 Fed. 945; Haubert v. Baltimore & O. R. Co. (D. C.) 259 Fed. 361; Nash v.Southern Pacific Co. (D. C.) 260 Fed. 280; Westbrook et al v. Director General of Railroads (D. C.) 263 Fed. 211; Hatcher & Snyder v. A., T. & S. F. Ry. Co. (D. C.) 258 Fed. 952; Southern Cotton Oil Co. v. Atlantic Coast Line Ry. Co. and Wade v. Sea Board Air Line Co. (D. C.) 257 Fed. 138; Sagona v. Pullman Co. (Sup.) 174 N. Y. Supp. 536; Oyler v. C.. C.. C. & St. L. Ry., 17 Ohio Law Rep. 356; Public Service Commission v. New England Telephone & Telegraph Co., 232 Mass. 465, 122 N. E. 567, 4 A. L. R. 1662; Macleod v. New England Telephone & Telegraph Co., 250 U. S. 195, 39 Sup. Ct. 511, 63 L. Ed. 934; N. P. Railroad Co. v. State of North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897. There are other decisions construing section 10 as providing for the bringing of actions against the carrier corporation just the same as if no federal control had taken place. The cases cited as deciding that it is the carrier corporation that must be sued are Postal Tel. Co. v. Call, 255 Fed. 850, 167 C. C. A. 178; Jensen v. L. V. R. Co. (D. C.) 255 Fed. 795; Johnson v. McAdoo (D. C.) 257 Fed. 757; Witherspoon v. Postal etc., Co. (D. C.) 257 Fed. 758; The Catawissa (D. C.) 257 Fed. 863; Dampscibs v. Hustis (D. C.) 257 Fed. 862; Lavalle v. N. P. R. Co., 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659; Gowan v. McAdoo, 143 Minn. 227, 481, 173 N. W. 440, 443; Palyo v. N. P. R. Co. (Minn.) 175 N. W. 687; Ringquist v. D., M. & N. R. Co. (Minn.) 176 N. W. 344; McGregor v. G. N. R. Co. (N. D.) 172 N. W. 841, 4 A. L. R. 1635; Franke v. C. & N. W. R. Co. (Wis.) 173 N. W. 701; M. P. R. Co. v. Ault (Ark.) 216 S. W. 3; Lancaster v. Keebler (Tex. Civ. App.) 217 S. W. 1117; Clapp v. Am. Ex. Co., 234 Mass. 174, 125 N. E. 162; Ownes v. Hines (N. C.) 100 S. E. 617.

It would serve no useful purpose to review these cases. It is conceded that most of them declare the law contrary to the conclusion reached in this case, but the reasoning upon which the decisions are based is not persuasive.

[4] The next question for consideration is as to whether the plaintiff having applied for and received the benefits of the act to provide compensation for employees of the United States suffering injuries while

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in the performance of their duties is barred from maintaining this suit. Section 1, c. 458, 1st Sess. 64th Cong., 39 Stat. 742 (Comp. St. § 8932a), in part reads as follows:

"That the United States shall pay compensation as hereinafter specified for the disabiltiy or death of an employee resulting from a personal injury sustained in the performance of his duty."

Section 15 (section 8932h) provides:

"That every employee injured in the performance of his duty, or some one on his behalf, shall, within forty-eight hours after the injury, give written notice thereof to the immediate superior of the employee. Such notice shall be given by delivering it personally or by depositing it properly stamped and addressed in the mail."

Section 16 (section 8932hh) specifies what the notice above mentioned shall contain. Section 17 (section 8932i) provides that unless the notice is given, or unless the immediate superior has actual knowledge of the injury, no compensation shall be allowed. but for any reasonable cause shown the United States Employee's Compensation Commission may allow compensation if the notice is filed within one year after the injury. Section 18 (section 8932ii) provides that no compensation shall be allowed to any person, except as provided in section thirty-eight, unless he or some one on his behalf shall within the time specified in section twenty make a written claim therefor, and such claim shall be made by delivering it at the office of the commission, or to any commissioner, or to any person whom the commission may designate, or by depositing it in the mail properly stamped and addressed to the commissioner, or to any person whom the commission may by regulation designate. Section 20 (section 8932jj) provides that all original claims for compensation for disability shall be made within 60 days after the injury, provided that the commission may allow original claims for compensation for disability to be made at any time within one year. Section 26 (section 8932mm) provides that, if any injury or death for which compensation is payable is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right he may have to share in any money or other property received in satisfaction of such liability of such other person or the commission may require said beneficiary to prosecute said action in his own name. If the beneficiary shall refuse to make such assignment, or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under the act. The section last referred to then provides as follows:

"The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner After deducting the amount of any compensation already paid to the beneficiary and the expense of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury."

Section 27 (section 8932n) reads as follows:

"That if an injury or death for which compensation is payable under this act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the Unitel States for such injury or death receives, as a result of a suit brought by him or on his behalf, or

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as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner.

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

"(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

We have called attention to those provisions of the act which relate to injuries caused by other persons than the United States, for the reason that the plaintiff claims in this case that the Director General was the agent of the Illinois Central Railroad Company, and therefore the injury received by the plaintiff was caused by a person other than the United States. It plainly appears from the statute above quoted that whether the employee assigns his cause of action against a person other than the United States to the United States. and the same is prosecuted by said commission, or whether the employee prosecutes the cause of action himself, the employee gains nothing, but the whole recovery, after deduction of the expense of litigation, either goes into the compensation fund out of which employees are paid, or is retained by the employee and the amount thereof is credited to the United States on future payments So that in any event the employee realizes nothing from the liability of a person other than the United States. In this very case the plaintiff would receive nothing, if he should collect his judgment other than his compensation under the Compensation Act.

[5] This discussion, however, is wholly futile, as a mere inspection of the law conferring power upon the President to take possession of the systems of transportation and his proclamation in acting under said law makes it so clear that the Director General was an agent of the United States and not of the railroad company that there is no basis for the contention of counsel for plaintiff. As we have before stated, the Director General was the agent of the United States, and this action is in legal effect against the United States.

The only question left is as to the right of the plaintiff to not only receive compensation under the Compensation Act, but also to sue the United States for the negligence causing his injuries. In other words, must the United States pay both compensation and damages for negligence to the same person for the same injury Workmen's Compensation Acts are all alike as to the object sought to be attained, but they are so numerous and so varied as to details of administration that each act must be construed by itself. We are of the opinion that as to the United States the act in question is compulsory, if the employee gives the notice and files the claim in proper form according to the terms of the statute and the regulations of the commission. It is optional with the employee as to whether he will make a claim under the act or not. If he does not in our opinion he would have a right to maintain the present action and prosecute the same to judgment, as we think that the United States as to this particular case by the Federal Control Act consented to be sued But if the employee elects to receive the benefits of the Compensation Act and his claim is allowed, then he is barred from prosecuting his action for negligence against the United States. In other words, he must elect

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which of the two remedies he desires to pursue, and, having elected to pursue one, he may not pursue the other. The United States under the statute being bound to pay the plaintiff after the latter has elected to claim the benefits of the Compensation Act, the remedy afforded by the act is exclusive. Mitchell v. Louisville, etc., R. Co., 194 Ill. App. 77; McRoberts v. National Zinc Co., 93 Kan. 364, 144 Pac. 247; Shade v. Ash Grove Lime, etc., Co., 92 Kan. 146, 139 Pac. 1193; Piatt v. Swift, 188 Mo. App. 584, 176 S W. 434 (Kansas Act); Middleton v. Texas Power, etc., Co., 108 Tex. 96, 185 S. W. 556. That the employee cannot recover both damages and compensation is sustained by the following cases: Barry v. Bay State St. Ry. Co., 222 Mass. 366, 110 N. E. 1031, 1032; Turnquist v. Hannon, 219 Mass. 560, 107 N. E. 443; Cripp's Case, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828; Pawlak v. Hayes, 1162 Wis. 503, 156 N. W. 464, L. R. A. 1917A, 392; McGarvey v. Independent Oil, etc., Co., 156 Wis. 580, 146 N. W. 895; Woodcock v. London, etc., R. Co., [1913] 3 K. B. 139, 6 Butterworth's Workmen's Compensation Cases, 471; Page v. Burtwell, [1908] 2 K. B. 758, 1 Butterworth's Workmen's Compensation Cases, 267; Oliver v. Nautilus Steam Shipping Co., [1903] 2 K. B. 639, 5 Minton-Senhouse's Workmen's Compensation Cases, 65; Huckle v. Council, 4 Butterworth's Workmen's Compensation Cases, 13 (affirmed 3 Butterworth's Workmen's Compensation Cases, 536, 26 T. L. R. 580); Mahomed v. Maunsell, 1 Butterworth's Workmen's Compensation Cases, 269; Murray v. North British R. Co., 41 Scottish Law Rep. 383; Mulligan v. Dick, 41 Scottish Law Rep. 77; Tong v. Great Northern R. Co., 4 Minton-Senhouse's Workmen's Compensation Cases, 40, 86 L. T. Rep. (N. S.) 02; Workmen's Compensation Acts; Corpus Juris Treatise.

We are of the opinion that upon principle and authority the plaintiff is barred from maintaing this action for negligence against the United States which makes it unnecessary to consider assignments of error relating to the trial of the case. Judgment below is reversed, and the case remanded, with directions to dismiss the complaint of the plaintiff. Leave is given to substitute the name of John Barton Payne in place of Walker D. Hines, Director General, if defendant is so advised. Act Feb. 28, 1920, § 206.

GINNOCHIO v. HYDRAULIC PRESS BRICK CO. (No. 1804.)

(United States District Court, S. D. Ohio, E. D. April 14, 1920.)

266 Federal Reporter 564.

1. MASTER AND SERVANT — TIME OF TAKING EFFECT OF OHIO WORKMEN'S COMPENSATION ACT.

Under Ohio Workmen's Compensation Act March 14, 1913, which went into effect January 1, 1914, and section 22 of which provides that employers subject to the act "shall in the month of January, 1914, and semiannually thereafter," pay the premium determined by the State Industrial Commission, or may at their election, with the consent of the commission and on giving security, undertake to pay compensation direct to their injured employees or their dependents in case of death, an employer which prior to January 1, 1914, notified the commission of its intention to comply with the statute and its election to pay direct, and

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thereafter did all that was required of it without delay or default, paying the premium and furnishing its bond on January 30th, *held* under protection of the act as of January 1st.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

4. MASTER AND SERVANT—EMPLOYER, COMPLYING WITH STATUTE, NOT DEBARRED FROM BENEFIT BY DELAY CAUSED BY PUBLIC OFFICIALS.

An employer, who has complied with a workmen's compensation statute on his part without delay or default, is not debarred of its protection because of delay by a public official or administrative board in performance of a ministerial duty.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

At Law. Action by Charles Ginnochio, administrator, against the Hydraulic Press Brick Company. On demurrer to second and third defenses of answer to second admitted petition. Demurrers overruled.

Paxton, Warrington & Seasongood, of Cincinnati, Ohio, for plaintiff.

Bulkley, Hauxhurst, Saeger & Jamison, of Cleveland, Ohio, and Edward R. Meyer, of Zanesville, Ohio, for defendant.

SATER, D. J. [1] The charge made in the second amended petition is briefly as follows: The decedent Curcio, while engaged in the course of his employment by defendant, on account of its negligence met with an injury on January 2, 1914, in consequence of which he died on the day following. The defendant regularly employed at that time more than five workmen and operatives in and about its business and establishment, and had not paid into the insurance fund,as provided by the Workmen's Compensation Act of Ohio, passed March 14, 1913 (103 Ohio Laws, p. 72), any sum for the benefit of employees who might be injured or the dependents of those who might be killed in the course of their employment, and had not otherwise complied with any of the provisions of such act. The prayer is for recovery on account of the defendant's alleged specific acts of negligence.

The second defense contains the following averments: The defendant in December, 1913, and thereafter, employed more than five workmen and operatives regularly in its business. On December 29, 1913, it notified the Industrial Commission, successor to the state liability board of awards, of its intention to comply with the above-mentioned act and of its election to pay compensation directly to its injured employees or the dependents of such as might be killed in the course of their employment. Its application for authority so to pay was approved by the commission on January 7, 1914. On January 12 the commission issued its statement of premium to defendant and fixed the amount of the bond required of it under the act. On January 30 such bond was filed and the premium paid. The bond was approved by the commission on February 3. Defendant asserts compliance as of January 1 with the act and the orders of the commission, and claims that at the time of Curcio's injury and death it was entitled to all protection, rights, and privileges afforded to employers who have complied with its provisions, and that Curcio's dependents are limited to the compensation therein provided, and cannot hold the defendant to respond in damages. The third defense is contributory negligence.

To each of such defenses a demurrer is interposed. The provisions of the statute which deny compensation in case of injury or death "purposely self-inflicted" are not involved. If the defenses named are good, it is because defendan's application, which was on file with the commission on

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January 1, when the act went into effect, and its subsequent compliance within that month with all legal requirements, entitled it to protection at the date of Curcio's accident and death.

Under the well-placed facts, admitted by the demurrer to the second defense the defendant, if it complied with the provisions of section 22, is not liable in damages at common law or by statute. Section 23. If it did not thus comply, it is subject to the following pertinent provisions of section 26:

"Employers mentioned in subdivision 2 of section 13 hereof, who shall fail to comply with the provisions of section twenty-two hereof, shall not be entitled to the benefits of this act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employees, and also to the personal representatives of such employees where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses: The defense of the fellow servant rule, the defense of the assumption of risk or the defense of contributory negligence."

The defendant, having had in its service down to Curcio's death five or more workmen regularly in its establishment under contract of hire, was an employer within the terms of subdivision 2 of section 13. Curcio was an employee within the definition of that term found in subdivision 2 of section 14. The second subdivision of section 21 provides that the dependents of an empolyee who is killed "on and after January 1, 1914," in the course of their employment, "shall be entitled to receive, either directly from his employer as provided in section 22 hereof, or from the state insurance fund, such compenastion for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medicines, and such amount of funeral expenses in case of death, as is provided by sections 32 to 40 inclusive." Section 22, in so far as pertinent, is as follows:

"Except as hereinafter provided, every employer mentioned in subdivision two of section thirteen hereof shall, in the month of January, 1914, and semiannually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by the board: * * * Provided, * * * that such employers who will abide by the rules of the state liability board of awards and as may be of sufficient financial ability or credit to render certain the payment of compensation to injured employees or to the dependents of killed employees, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in this act, * * * may, upon a finding of such facts by a state liability board of awards elect to pay individually * * * such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such inpjured or the dependents of such killed employees; and the state liability board of awards may require such security or bond from said employers as it may deem proper, adequate and sufficient to compel, or secure to such injured employees, or to the dependents of such employees as may be killed, the payment of the compensation and expenses herein provided for, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases, to injured employees or to the dependents of killed employees, whose employers contribute to said fund. * * *"

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On May 18, 1915, Wallace D. Yaple, as chairman of the Industrial Commission, after stating the facts disclosed by its record as to defendant's application for classification of industry and premium, which facts are the same as those pleaded in the second defense, wrote the defendant as follows:

"During the month of January, 1914, which was the month in which the Workmen's Compensation Act of 1913 became compulsory, this department was unable to transact the immense volume of business which came to it, which accounts for the delay from December 30, 1913, to January 12, 1914, in advising the company of the amount of its bond and premium, and also for the delay from January 30, 1914, to February 3, 1914, in approving the bond. Section 22 of the Compensation Act seems to contemplate that the employer should have the entire month in which to comply with the provisions of the act by either paying his premium into the state insurance fund or by electing to pay compensation, etc., direct, and we have held in a number of state insurance cases that where an employer paid his premium into the fund at any time during the month of January that he was protected from the 1st day of January. We think the same thing should be true in self-insurance cases as well, and it appears that Hydraulic Press Brick Company complied with the terms of the act and did all that it was required to do within the month of January; its bonds and premiums benig reecived on January 30, 1914. That being true, it is our opinion that it complied with the law and that it was under compensation from January 1, 1914."

No other utterance affecting a case of like character has been cited. The Industrial Commission, however, on July 1, 1914, in Biddinger v. Champion Iron Co., 13 O. L. R. 65, rendered another opinion, which, notwithstanding the difference in facts reflects that body's views and practice in dealing with an employer who proceeds to qualify under the act. The company's application for classification was filed on December 17, 1913. On account of correspondence between it and the commission in reference to the proper classification of the industry in which it was engaged, its classification and rating and the amount of its first annual premium were not determined until March 6, 1914, on which date it was furnished with a "pay-in-order," directed to the treasurer of state, authorizing him to receive the amount of the premium. The company, the commission held, had the opportunity to comply with the law not later than March 10, but it did not do so until the death of its employee on April 10. The commission said:

"Had the injury resulting in Biddinger's death occurred prior to the 6th of March, 1914, we would have no hesitancy in arriving at the conclusion that the company had made diligent effort to comply with the law, and so had done all that could reasonably be required of it, and under such circumstances would order the compensation paid out of the state insurance fund. But we do not think that the facts in this case justify such a course. The provisions of the act are clear. Section 22 provides in substance that it shall be the duty of all employers employing five or more employees to either pay their premium into the state insurance fund in the month of January, 1914, and semiannually thereafter, or, by proper proceedings before the Industrial Commission, to make arrangements to pay compensation direct to their injured and the dependents of their killed employees. The language is plain and there is no room for construction, and it is obvious that to order payment of compensation in this claim out of state insurance fund would not only be a plain violation of the law, but would establish a precedent which would be prolific of abuses."

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[2] The contemporaneous and practical construction of the statute by the Industrial Commission, an administrative tribunal, whose duty it is to carry it into effect, is entitled to great respect. Though not absolutely controlling, it is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. U. S. v. Moore, 95 U. S. 760, 763, 24 L. Ed. 588; Barrett v. Grays Harbor Commercial Co. (D. C.) 209 Fed. 95; Industrial Comm. v. Brown, 92 Ohio St. 309, 311, 110 N. E. 744, L. R. A. 1915B, 1277. I am convinced that its views, as expressed by its chairman, Mr. Yaple, are correct. One of the methods of compensating injured or the dependents of killed employees is effected by the employer paying into the state insurance fund the amount of premium fixed by the Industrial Commission, as determined by its clasifications, rules and rates; another is by the employer's paying the compensation himself, providing he is able to furnish satisfactory proof to the commission of his financial ability so to do, in which case the commission may require of him such security or bond as will in its judgment insure payment to persons entitled to the same. Employers thus availing themselves of the statute are arranged into two classes—(1) contributors from choice to the state insurance fund; and (2), noncontributors thereto, who by their own election and by permission of the commission pay directly to the prescribed beneficiaries. The statute establishes the rule of equality as to their status, and also as to the amount of compensation to be received by employees, whether it be paid from the state insurance fund or directly by their employers. In addition to section 22, see also the second subdivisions of sections 21 and 22, the first subdivision of section 25, sections 23, 26, and 29, and State v. Fidelity Co., 96 Ohio St. 250, 117 N. E. 232.

It is true that under the second subdivision of section 25 a noncontributing employer may, by reaon of some rule or regulation of his own, be compelled to pay a greater compensation than a contributing employer; but the establishment and maintenance of such rule of regulation is entirely voluntary on his part. The statute expressly provides that, beginning with January 1, 1914, the defendents of an employee killed in the course of his employment—his death not being purposely self-inflicted —shall be compensated from the state insurance fund (if his employer has become a contributor to such fund), or by his employer (if such employer has qualified to pay directly to them. Its provisions are equally clear that the employer, whether a contributor to the state insurance fund or of the class to which the defendant belongs, if he brings himself within the terms of the act within that month becomes entitled, as of the 1st day of such month, to all the protection the act affords. Curcio's dependents, in consequence of his death, became entitled to compensation from the defendant, and this was so, even if thepetitioning employer and the Industrial Commission had not performed all the acts required of them respectively by statute. Their right and defendant's liability were coexistent.

The Legislature declared that the injured and the dependents of killed employees should be compensated, and designated the means by which and the persons by whom payment shall be made. The lawmaking body, it must be presumed, was cognizant of the physical inability of the Industrial Commission to consider and dispose of the multitude of applications of employers immediately after midnight of December 31, 1913, or for some time thereafter. It did not intend that either employees or employers should even temporarily be deprived of the benefits of the act. Having conferred the right to compensation for injury or death occurring on and after January 1, it therefore by section 22 gave employers the whole of the month of January in which to qualify under its provisions. The defendant in this case, having within that time met every requirement imposed on it, obtained all the protection and benefits which

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the act accords. The protection thus secured related back to and became effective with the beginning of January 1. It was permissible for the Legislature thus to provide (Bernard v. Michigan United Traction Co., 198 Mich| 497, 165 N. W. 846); the purpose of the retroactive feature being to prevent penalizing of an employer by the denial to him of his common-law defenses after his lawfully declared intention and diligent effort to come under the act.

The statute is highly remedial in character (Honnold, Workmen's Compensation, § 6 ,p. 25), and is not therefore violative of the State Constitution (Peters v. McWilliams, 36 Ohio St. 155, 161 162). Retrospective laws that violate no principle of natural justice, but are in furtherance of equity and good morals, are not forbidden in Ohio. Trustees of Cuyahoga Falls Real Estate Ass'n v. McCaughy, 2 Ohio St. 152, 153. That an employer who, in the month of January, diligently endeavored to bring himself within the statute, shall have its benefits as of January 1, is not expressly declared in the Ohio act, is in that of Michigan; but it is necessarily implied, and what is implied in a statute is as much a part of it as what is expressed. Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175, 17 L. Ed. 520; Id., 68 U. S. (1 Wall.) 221, 17 L. Ed. 519; U. S. v. Babbit, 66 U. S. (1 Black) 55, 61, 17 L. Ed. 94. The defendant by virtue of such relation back became liable, commencing with January 1, to compensate its injured or the dependents of its killed employees, who in the meantime had met with accident or death in the course of their employment. Had the defendant become a contributor to the state insurance fund, the protection afforded to the parties hereto would have been the same. Other provisions which gave both classes of employers the whole of the month of January, in each and every year the statute remains in force, to bring themselves by diligence within its protection for the whole of that month, and which confer on its designated beneficiaries the right to compensation, are found in section 17 and 19, and subdivision 1 of section 21.

[3] Consideration of section 26 points to the conclusion above reached. The employers who are debarred from the benefits of the statute during noncompliance therewith are those "who shall fail to comply with the provisions of section 22." "Fail" means "to be wanting in action." Cen. Dict. The words "fail to comply," in general, have the same operation in law as the words "refuse to comply." Taylor v. Mason, 22 U. S. (9 Wheat.) 325, 344, 6 L. Ed. 101. Had the defendant been wanting in diligence, and prolonged performance on its part beyond the month of January, the rule applied in the Biddinger Case, it would seem, would have obtained. But the defendant did not refuse, and was not wanting in action, to comply with the requirements of the statute. Notice of acceptance of its provisions even preceded the date on which it became operative, the sufficiency of which notice cannot be questioned. Coakley v. Mason Mfg. Co., 37 R. I. 46, 90 Atl. 1073.

[4] To the charge of noncompliance before January 3, the answer is that, if there were such in fact, it was not such noncompliance as depended on the will of the defendant, but was rather due to the commission's discharge of its manifold duties preventing the defendant's earlier qualification to secure the protection of the act. On such a state of facts the defendant's position would be quite as favorable as that of the person to be benefited by a statute, who has performed within the time allotted therefor all that was required to be done by him, but who falls short of complete performance within such period on account of the failure of some public official or board to perform a ministerial or administrative duty. He will not under such circumstances be penalized for the delay in official action (Coakley v. Mason Mfg. Co., supra; Industrial Com. v. Patterson, 65 Ohio Law Bull. 94), or denied the protection and benefits which the

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statute confers (Pace v. Volk, 85 Ohio St. 413, 416, 417, 98 N. E. 111; Heininger v. Davis, 96 Ohio St. 205, 213 117 N. E. 229; Burchard v. State, 83 Ohio St. 1, 93 N. E. 199). His rights have been preserved, even when the misapprehension or inability of a judge has delayed action. J. D. Randall Co. v. Foglesong Mach. Co., 200 Fed. 741, 119 C. C. A. 185 (C. C. A. 6); Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 Fed. 350, 138 C. C. A. 612 (C. C. A. 6.)

The demurrers to the second and third defenses are overruled, and an order may be taken accordingly.

BERG v. PHILADELPHIA & R. RY. CO. (No. 4824.)

(United States District Court, E. D. Pennsylvania. June 28, 1920)

266 Federal Reporter 591.

2. ADMIRALTY — FEDERAL COURT HAS JURISDICTION AT LAW TO ENFORCE MARITIME RIGHT.

A federal court has jurisdiction of an action at law to enforce a right arising under the maritime law, where there is requisite diversity of citizenship and amount involved, but such right is measured by the maritime law.

(For other cases, see Admiralty, Dec. Dig. § 2.)

At Law. Action by Carl A. Berg against the Philadelphia & Reading Railway Company. On motion by defendant for new trial. Denied.

Karl G. Kirsh, of Philadelphia, Pa., and S. B. Axtell, of New York City, for plaintiff.

William Clarke Mason, of Philadelphia, Pa., for defendant.

THOMPSON, D. J. The plaintiff, a seaman on the barge Wiconisco, owned and operated by the Philadelphia & Reading Railway Company, received injuries on the barge while at sea, for which he brought suit to recover damages in a common-law action. The plaintiff was operating a donkey engine on a barge while in New York Harbor, where it, with a number of others, had been towed for anchorage because of threatening weather on a voyage from Philadelphia to Portland. When the accident occurred, the Wiconisco was operating her steam winch in pulling up another barge. The hook had been caught into an eyebolt fastened into the deck to hold the snatch block in place, when the strain upon the line caused the hook to break, causing the snatch block to fly out and the line to strike the plaintiff's leg, causing the injury complained of.

There was evidence on the part of the plaintiff to show that the eyebolt was bent and twisted in such manner that, instead of the eye being upright, it inclined towards the deck to such an extent that the hook could not be inserted from below, and in inserting it from above the point of contact of the hook with the eyebolt was such that, instead of a direct pull upon the hook, it not being properly seated, its bearing upon the eyebolt was some inches nearer the point of the hook than if properly seated, and the leverage caused it to break. There was no latent or patent defect in the hook itself.

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There was evidence on the part of the defendant that the accident was caused through the plaintiff's negligence in taking too many turns of the line around the drum before starting the winch.

[1] The cause of the plaintiff's injury was alleged on the statement of claim to be the failure of the defendant to provide a block and tackle and the attachments and fittings therof for use on the donkey engine, of a sufficient size, adequate strength, and quality for the uses and purposes to which it was necessarily put, and in that no suitable tackle was provided by the defendant, its agents, servants, and employees, for the carrying on of the work required of the plaintiff on board the barge.

I think the eyebolt, without which the block and tackle used on the donkey engine could not have been employed in hauling in the other barge, is included within the "attachments and fittings," and that the evidence that the eyebolt was so bent as not to permit the seating of the hook to its normal position was sufficiently set out in the allegation of lack of sufficient size and quality. The question whether the eyebolt was bent, and the bending caused the accident, was left to the jury, as was also the question of the plaintiff's negligence.

The charge of negligence and claim for indemnity is based upon the rule laid down in The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760:

"That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to such ship."

The defendant contends that, if there was a defect in the eyebolt, that fact was not evidence of unseaworthiness, relying on the cases of Hanrahan v. Pacific Transport Co. (C. C. A) 262 Fed. 951, and The Santa Barbara (C. C. A.) 263 Fed. 369.

In the Harnahan Case the injury arose from the temporary absence of a handrail while the vessel was lying alongside the wharf discharging cargo, and the plaintiff, who was also suing at law for a maritime injury, was held not entitled to indemnity, because, if there was negligence which caused the injury, it was the negligence of the master or other officers in not placing or causing to be placed in position the handrail. There was no charge in the case that no hanrail had been supplied, or that it was out of order, but merely that it had not been put up.

In the Santa Barbara Case, the negligence charged was a failure to maintain in position while at sea a chain for use in cleaning the smokestack, In Judge Hough's opinion, he says:

"The chains were supplied; whether unseaworthiness would have resulted, had that not been done, is a matter not before us. Whether they should be 'maintained,' or retained in the pulleys, and left stretched along the guys contributing weight without stretch, while the steamer tossed at sea, is a matter wholly within the discretion of the captain. If that discretion was unwisely exercised, it was at most no more than his personal negligence in handling or mishandling good and proper appliances duly furnished by the owners. As nothing was defective in fit or material, and everything suggested as proper, even by libelant's proctor, was provided for the ship, we hold that no unseaworthiness was shown."

The cases cited may be readily distinguished from that at bar, where the eyebolt was an essential attachment to the block and tackle for the purposes to which it was to be put when the donkey engine was operating. The failure to supply a proper eyebolt and to keep it in order brings the case under the rule of The Osceola, and renders the vessel and owner liable to indemnity for injuries, and not for mere maintenance and cure.

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[2] The defendant raises the question whether the federal courts have jurisdiction in a common-law action to apply maritime remedies, and relies upon the decisions in Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, and Knickebocker Ice C.. v. Stewart (No. 543, October Term, 1919) 252 U. S.——, 40 Sup. Ct. 438, 64 L. Ed. ——. A careful reading of these cases has failed to convince me that Mr. Justice McReynolds' opinions are susceptible of the construction asserted.

In this Chelentis Case, it is broadly held that Judiciary Act 1789, § 9, giving exclusive original and maritime jurisdiction to thh District Courts, saving "to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it," recognizes the fundamental distinction between rights and remedies, and allows a right sanctioned by maritime law to be enforced through an appropriate common-law remedy, but does not give a plaintiff his election to have the defendant's liability measured by common-law standards, instead of those prescribed by the maritime law.

And in the Knickerbocker Ict Co. Case, 252 U. S. ——, 40 Sup. Ct. 438, 64 L. Ed. ——, it is held that the statute of October 6, 1917, adding to to the jurisdiction clause of section 9 of the act of 1789 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1233) the words "and to claimants the rights and remedies under the Workmen's Compensation Law of any state," does not enlarge the rights of a plaintiff suing at common law, because Congress has no power to delegate its authority to legislate concerning maritime rights and liabilities in a manner to interfere with the harmonious and uniform administration of maritime jurisdiction throughout the United States.

In both cases Workmen's Compensation Law of New York (Consol. Laws, c. 67), were claimed to be the relief sought. Jurisdiction to entertain on the common-law side of the court an action to enforce maritime rights was distinctly recognized in the Hanrahan Case by the Circuit Court of Appeals for the Second Circuit, and I construe the Chelentis Case as also recognizing jurisdiction in the federal courts.

The jurisdiction conferred under section 24 of the Judicial Code (Comp. St. § 991) over all suits of a civil nature, at common law, where the matter in controversy exceeds the sum or value of $3,000, between citizens of different states, gives the District Court, within the limitations expressed, jurisdiction. where the state courts would have jurisdiction. so that causes arising out out of maritime rights may be brought in the federal courts in all cases where they may be brought in the state courts, subject to the diversity of citizenship an jurisdictional amount, but the rights of the plaintiff may be enforced only according to maritime law.

The damages were not, in my opinion, excessive, even if the jury found that the plaintiff was guilty of contributory negligence and divided the damages. The plaintiff was seriously crippled by breaking up of the bones of one leg, which is twisted and materially shorter than the other, with a possibility of lessening the shortening by a serious and complicated operation.

The motion for a new trial is denied.

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ENGELS COPPER MINING CO. v. INDUSTRIAL ACC. COMMISSION et al. (No. 3018.)

(Supreme Court of California. September 17, 1920. Rehearing Denied October 14, 1920.)

192 Pacific Reporter 845.

1. MASTER AND SERVANT — COMPENSATION ALLOWABLE FOR INJURY BY DISEASE.

Incapacitating injury to the heart, through influenza contracted by the employee of a copper mining company, was an injury for which compensation could be awarded, under Const. art. 20, § 21, as it was before amendment.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

2. MASTER AND SERVANT — INJURY IN VOLUNTARY ACT OUTSIDE EMPLOYMENT NOT IN COURSE OF EMPLOYMENT WITHIN COMPENSATION LAW.

An injury suffered by an employee in voluntarily doing something outside of his employment, though for the benefit of his employer, is not an injury, suffered by him in the course of employment, entitling him to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

3. MASTER AND SERVANT — COMPENSATION ALLOWABLE FOR INJURIES IN CARING FOR INFLUENZA PATIENTS PURSUANT TO DIRECTION.

Where a copper mining company's superintendent directed its safety engineer to assist in caring for the company's influenza patients, the engineer's services in so doing were not voluntary, though exceptional, and, though they were without the usual scope of his employment, they were within its actual scope, and injuries suffered therein entitled the engineer to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

4. MASTER AND SERVANT — COMPENSATION CLAIMANT MUST SHOW CAUSE OF INCAPACITATING ILLNESS.

The burden rested upon an injured employee seeking compensation to show that illness which resulted in his incapacity resulted from the exceptional exposure to which he was subjected in caring for the influenza patients of his employer.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT — COMPENSATION AWARD CONCLUSIVE UNLESS UNREASONABLE.

The Supreme Court cannot disturb the award of the Industrial Accident Commission, unless it can say that a reasonable man, on the evidence as to whether the illness contracted by the employee caused his incapacity, could not have reached the conclusion which the commission did.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

6. MASTER AND SERVANT — COMPENSATION AWARD FOR ILLNESS WARRANTED BY EVIDENCE.

Evidence that a mining company's employee, incapacitated for work through heart weakness caused by influenza, contracted the disease while

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caring for the company's patients during an epidemic at the direction of its superintendent, *held* sufficient to sustain award of compensation to him.

(For other cases, see Master and Servant, Dec. Dig. 405[4].)

In Bank.

Proceeding for compensation under the Workmen's Compensation Act (St. 1917, p. 831) by Duane Rebstock, the employee, opposed by the Engels Copper Mining Company, the employer. Compensation was awarded by the Industrial Accident Commission, and the employer petitions for certiorari. Award affirmed.

R. P. Wisecarver and Bedman & Alexander, all of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

OLNEY, J. This proceeding is one seeking the annulment of an award of the Industrial Commission. One Rebstock was taken ill with influenza while in employ of the petitioner, a mining company, resulting in an affecton of the heart which incapacitated him for anything but light work. For this he claimed and was awarded compensation. Two grounds are advanced for the annulment of the award: First, that injury by disease is not an injury for which compensation could be awarded under section 21 of article 20 of the Constitution as it read before its recent amendment and at the time Rebstock contracted influenza; and, second, that the disease was not incurred by him as the result of his employment.

[1] The case markedly resembles what is known as the Slattery Case, San Francisco v. Industrial Accident Commission, 191 Pac. 26, decided by us since the submission of the present case, and the question presented by the first ground urged for annulment, which is purely a question of law, was there discussed and determined adversely to the contention of the petitioner here. No discussion, therefore, of that question is necessary other than a reference to that decision and the statement that we adhere to the views there expressed.

The question presented by the second ground urged, that Rebstock did not contract the disease as the result of his employment, is of course a question of fact and cannot be summarily disposed of, although the substantial facts of the case are in most respects the same as those of the Slattery Case. Rebstock was employed at the company's mine in Plumas county as a "safety engineer." His duties in that capacity did not require him to give attention to or come in contact with sick employees of the company, at least above ground. The epidemic which prevailed throughout the country in the fall of 1918 did not omit the little settlement at the company's mine, and a very considerable number of its employees were attacked. The company attempted to care for these cases in its hospital and in temporary accommodations for that purpose. Among the places so used was Rebstock's office. The number of regular medical attendants and nurses of the company was insufficient to meet the emergency, and in this situation Rebstock practically gave up his regular duties, and for some five or six days devoted himself to caring for the influenza patients, bathing them, giving them food and medicine, attending to their wants generally, and having the closest personal contact with them. At the end of that time he himself was taken with the disease, resulting finally in his permanent industrial impairment, as alread stated. The period of incubation of the disease is from two to five days, so that Rebstosk in all probability contracted the disease during the period when he was exposed to the contagion in an exceptional manner because of his attendance upon influenza patients.

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The company's first claim it that the exceptional exposure to which Rebstock was subject, and by reason of which alone it can be claimed that he contracted his illness in the course of his employment, was incurred by him , not in the performance of the duties for which he was employed, but in the performance of services outside his duties, voluntary in nature, and not so much for the benefit of his employer as for that of the little community of which he was a part. The second claim of the company is that in any case there is nothing to show that Rebstock contracted his disease by reason of the exceptional exposure to which he was subjected; that it it not at all improbable that he acquired it by reason of the general exposure to which every member of the community was subjected at the time; that it is not possible to determine with any reasonable certainty whatever which exposure was the cause of his illness, and to endeavor to do so is but guessing; and that the award of the commission cannot be justified by a mere guess, but in order to be valid requires for its support an affirmative showing which takes the determination out of the realm of mere conjecture.

[2, 3] As to first claim, it is true that an injury suffered by an employee in voluntarily doing something entirely outside of his employment, even though of benefit to his employer, is not an injury suffered by him in the course of his employment, and if the facts of this case were only those we have stated it might be that the award would have to be annulled on that ground. But there was evidence in the case which would justify the commission in believing that the further fact was present that the company's superintendent had directed Rebstock to assist in caring for the company's influenza patients. This fact, for we must take it to be the fact, at once took Rebstock's services in that respect out of the class of purely voluntary services. Although the services were exceptional, and without the usual scope of Rebstock's employment, they were within its actual scope at the immediate time, because rendered in response to the company's direction. Miner v. Franklin County Telephone Co., 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195; Sunnyside Coal Co. v. Industrial Accident Commission, 291 Ill. 523, 126 N. E. 196, and authorities there cited. This is sufficient to justify the award so far as this particular point is concerned.

[4, 5]As to the second contention of the company, it is of course true that the burden rested upon Rebstock to show that his illness resulted from the exceptional exposure to which he was subjected in caring for the patients of the company. It is likewise true that in order to meet this burden he had to show facts sufficiently cogent to take the determination of the question out of the realm of pure conjecture. It is also true that it cannot be said from the facts of the case that it is certain that Rebstock contracted the disease because of his exceptional exposure to it. But as was said in the Slattery Case, 191 Pac. 29:

"Certainty is not required. It is not even required that the award be, in our judgment in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did."

The test so stated in the last statement just quoted is that which must be applied here.

Upon the point as to how the disease was contracted by the employee, whether because of the exceptional exposure to which he was subjected or because of the exposure to which he was subjected in common with the rest of the community, the material facts are the same as those of the Slattery Case. The medical evidence in the Slattery Case is by stipula-

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tion made a part of the record here, and the discussion upon this point in the Slattery Case will suffice for the discussion in this. That discussion was:

"If there had been no epidemic in San Francisco at the time, and it appeared that Slattery as hospital steward had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period of incubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was Slattery, the question of whether he was attacked because of the exposure incident to his employment or because of the exposure general to the public would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that of persons exposed as was Slattery the proportion of those attacked was from five to eight times as great as the proportion of those not so exposed. This ratio is so great that it cannot be said that the commission was not justified in concluding from it, in connection with the other facts, that Slattery's illness was due to the peculiar exposure of his employment. Its conclusion it the more justified by the fact that it coincides with the conclusions of most of the pyhsicians who testified. Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread, and to draw conclusions from their observations."

[6] There was one particular in which perhaps it might be said that the facts here differ from those of the Slattery Case. The evidence there might be taken to show that Slattery's exposure to the disease, outside of that incident to his employment, was less than the similar exposure of Rebstock. The testimony of Slattery's wife was that during the probable period of incubation he had been confined pretty strictly to his home and to the hospital where he was employed. This factor is absent in the present case. But, as the foregoing quotation shows, the reasoning by which we reached the conclusion that the finding of the commission that Slattery's illness had been contracted because of exceptional exposure should be sustained did not proceed upon the assumption that he was not also exposed as a member of the community, or that his exposure in that respect was less than that to which the community in general was subjected. On the contrary, it proceeds on the assumption that he was exposed in that respect like any one else, and the conclusion reached is justified by reason of the very great difference between the respective proportions of those attacked in the community at large and those attacked in the class exposed in the exceptional manner in which were both Slattery and Rebstock. The proportion of the latter was from five to eight times as great, and this was deemed, and we deem it now, sufficient to remove from from the realm of pure conjecture the conclusion that a person so exceptionally exposed and contratcing the disease contracted it in the course of such exposure.

There was urged upon us in the Slattery Case, and there is urged upon us now, the authority of Martin v. Manchester Corporation, 5 B. C. C. C. 259, and it is well, perhaps, for us to express our views concerning it. It was there held that the conclusion was not justified that an employee of a scarlet fever hospital, particularly exposed to the disease in the course of his employment and who was attacked by it, acquired the disease through such exposure. It is said that he might have acquired

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it in some other manner. It is, of course, true that he might have acquired the disease in some other manner, but that he actually did so would seem to be quite improbable. The decision practically requires absolute certainty as to the fact that the disease was contracted because of the employment and in no other manner. This is not possible or necessary. All that is required is that degree of certainty upon which men may reasonably act, and by which their affairs may reasonably be determined. It would seem well-nigh beyond argument that for the practical conduct and governance of human affairs the conclusion that a man attacked with scarlet fever had incurred the infection by his exposure to it in a scarlet fever hospital would appear with sufficient certainty when it appeared that he had been employed in the hospital during the period when he must have been infected, and there daily brought into close contact with patients suffering from the disease, and it did not appear that he had been particularly exposed in any other manner. We cannot follow the decision mentioned holding to the contrary.

Award affirmed.

We concur: Angellotti, C. J.; Lennon, J.; Lawlor, J.; Shaw, J.; Wilbur, J.; Sloane, J.

HINES, DIRECTOR GENERAL OF RAILROADS, v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9347.)

(Supreme Court of California. October 4, 1920. Rehearing Denied November 1, 1920.)

192 Pacific Reporter 859.

1. MASTER AND SERVANT — COMPENSATION COMMISSION'S FINDING HELD A CONCLUSION OF LAW PRESENTING REVIEWABLE QUESTION OF JURISDICTION.

Finding of Industrial Accident Commission that during the time the engine on which deceased employee was working when killed was withdrawn from service for repairs it was not engaged in interstate commerce at the time, *held* a conclusion of law, presenting the question of the jurisdiction of the commission to make the award, which may be considered on certiorari to review it.

(For other cases, see Master and Servant, Dec. Dig. § 417[6].)

Wilbur, J., dissenting.

In Bank.

Application by Walker D. Hines, Director General of Railroads, United States Railroad Administration, for certiorari to review an order of the Industrial Accident Commission, awarding Fernanda Brizzolara, Maybelle Brizzolara, and others compensation for death of Angelo Brizzolara. Award affirmed.

Henley C. Booth, of San Francisco, for petitoner.

O'Gara & De Martini, of San Francisco, for respondents Fernanda Brizzolara, Maybelle Brizzolara, Bartolomeo Brizzolara, and Angelo Brizzolara.

A. E. Graupner, of San Francisco, for respondent Industrial Accident Commission.

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LAWLOR, J. This is a writ of review issued upon the application of the petitioner, Walker D. Hines, as Director General of Railroads, United States Railroad Administration (Southern Pacific Railroad). On November 28, 1919, the respondent Industrial Accident Commission made an award against petitioner in the respective sums of $2,529.38 in favor of respondent Fernanda Brizzolara and $2,429.38 in favor of respondents Bartolomeo and Angelo Brizzolara. The award was made as compensation for the death of Angelo Brizzolara, an empolyee of William G. McAdoo, petitioner's predecessor in the office of Director General of Railroads.

As stated in petitioner's brief:

"The following findings of fact made by the commission * * * are fully sustained by the evidence:

"'(1) That Angelo Brizzolara, hereinafter called the empolyee, was injured on the 9th day of June, 1918, at San Francisco, * * * while in the employment of the United States Railroad Administration, William G. McAdoo, Director General, hereinafter called the employer, as a machinist's helper, and that said injury proximately caused the death of the employee on the same day.

"'(2) That at the time of said injury and death said employee was engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor. That when in service, said switch engine was used in both interstate and intrastate traffic. That the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to 30 per cent, of the whole. * * *

"'(3) That said injury arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employee was performing service growing out of and incidental to the same, and happened in the following manner: While he was adjusting brakes upon a switch engine, which was used exclusively in the Mission Bay yards of the Southern Pacific Company, his head was crushed by a brake beam.' "

Petitioner applied to the commission for a rehearing, but the application was denied. Its principal contention here is:

"That said award * * * and denial of a rehearing were * * * in excess of the jurisdiction of said commission, * * * * and in denial of a right, privilege, and immunity of this petitioner under * * * the Federal Employers' Liability Act."

1. Before proceeding to a discussion of this contention, it will be proper to consider a preliminary question raised by petitoner. In addition to the findings already quoted, the commission found:

"That during the time said engine was withdrawn from service for repairs, said engine was not engaged in any service, interstate or otherwise. That said employee was therefore not engaged in interstate commerce at said time, and both employer and employee were subject to the jurisdiction of this commission."

Petitioner claims that "the last-quoted findings are in reality not findings of fact, but conclusions of law by the commission." This claim is not controverted by respondents. The commission made a similar finding in Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E, 916 (hereinafter referred to as the Ruth Case, because the injury for which compensation was awarded had occurred to an employee of that name), wherein the court said:

"That finding is not, in strictness, a finding of pure fact, but rather is it a conclusion of law drawn from a consideration of the admitted facts, to which consideration have been applied principles of law of more or less intricacy."

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[1] This language is clearly applicable to the finding under consideration, which must therefore be regarded as a conclusion of law and as presenting the question of the jurisdiction of the commission to make the award—a question which may be considered on certiorari. Smith v. Ind. Acc. Comm., 26 Cal. App. 560, 147 Pac. 600.

2. This brings us to consider petitioner's principal contention, which, stated in different language, is that the deceased, at the time of the injury which resulted in his death, was employed in interstate commerce, and, therefore, that any compensation for such accident must be awarded under the Federal Employers' Liability Act (U. S. Comp. Stat., §§ 8657-8665), and not under the Workmen's Compensation Act of this state. Stat. 1917, c. 586.

[2] At the outset it is to be observed that, where an employee is injured while engaged in work directly relating to interstate commerce, the commission has no jurisdiction to award compensation for such injury, since the federal act already referred to is the exclusive remedy. Southern Pacific Co. v. Pillsbury, supra; Smith v. Ind. Acc. Comm., supra; Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Michigan Centl. R. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 501, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A.1915C, 1, Ann. Cas. 1915B, 475; N. Y. Centl. R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439 Ann. Cas. 1917D, 1139. Indeed the correctness of this rule is conceded by respondents. The sole question then becomes, upon the facts found by the commission, was the deceased employee, at the time he received the fatal injury, engaged in work directly relating to interstate commerce?

At first glance the answer to this question would seem to be governed by the Ruth Case. There, as here, at the time the employee was injured, he was engaged in repairing a switch engine which had been temporarily withdrawn from service. While in service it was used "in handling both inter- and intra-state commerce." It was held, after a discussion of the decisions bearing upon the federal statute involved, that the employee was engaged in interstate commerce, and the award of the commission was annulled. But since the Ruth Case was decided (August 7, 1915), a number of decisions involving the construction, and the application to similar facts of the Employers' Liability Act have emanated from this, and from the Supreme Court of the United States, and respondents contend that, in the light of those decisions, this court must, on the facts therein, reach a conclusion opposite to that in the Ruth Case. Do those authorities sustain this contention?

In N. Y. Centl. R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, the employee's injury was due to the negligence of a fellow servant (which barred a recovery under the New York law in the event that at the time of the injury the employee was engaged in interstate commerce). We quote from the opinion:

"Carr was a brakeman on a 'pick-up' freight train running from Rochester to Lockport. * * * On November 18, 1910, some of the cars in this train contained interstate freight. Among those engaged in purely interstate business were the two cars, at the head of the train and next to the engine, which were to be left at North Tonawanda, N. Y. On arriving at that point they were uncoupled from the train, pulled by the engine down the track, and then backed into a siding. * * * The railroad company insists that when the two cars were cut out of the train and backed into a siding they lost their interstate character, so that Carr while working thereon was engaged in interstate commerce. * * * The scope of" the federal Employers' Liability Act "is so broad that it covers a vast field, about which there can be no discussion. But owing to the fact

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that, during the same day, railroad employees often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from interstate business. * * * The matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. * * * *Each case must be decided in the light of the particular facts with a view of determining whether at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part of a necessary incident thereof.* Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury, and the judgment in his favor must be affirmed." (Italics ours.)

It appeared in Del. L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, that the defendant railroad company operated a colliery wherein coal was mined for use in its locomotives and other rolling stock used in interstate commerce. The plaintiff was injured while working in defendant's employ in the colliery. Applying the rule of the Carr Case, it was held that the accident did not occur in interstate commerce. See, also, Minneapolis & St. Louis R. R. Co. v. Nash, 242 U. S. 619, 37 Sup. Ct. 239, 61 L. Ed. 531; Raymond v. C. M. & St. P. Ry. Co., 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583.

In Shanks v. Del., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797 (January 10, 1916), it was held that—

"Where a railroad company ,which is engaged in both interstate and intrastate transportation, conducts a machine shop for repairing locomotives used in such transportation, an employee is not engaged in interstate commerce while taking down and putting up fixtures in such machine shop."

The court laid down this rule:

"Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, * * * and that *the true test of employment in such commerce in the sense intended is, Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?* * * * Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usual condition a roadbed, bridge, engine, car or other instrument *then in use* in such transportation. * * * The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation." (Italics ours.)

See, also, N. Y. Cent. R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.

C., B. & Q. R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941 (May 1, 1916), was a case where the employee was killed while engaged at defendant's Kansas City terminal yards as a member of a switching crew in transporting coal from a storage track to a coal shed,

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whence it was to be supplied to locomotives of all classes, engaged in interstate traffic. The court held that the federal act did not apply, and declared quoting with approval from the Shanks Case:

"It is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. * * * Manifestly, there was no * * * close or direct relation to interstate transportation in the taking of the coal to the coal chutes."

Upon the authority of this case it was held in Lehigh Valley R. R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070 (May 21, 1917), that a switchman was not engaged in interstate commerce while moving from a siding to an unloading trestle three cars of coal which had some three weeks before been brought from another state.

In Louisville & N. R. R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119 (November 13, 1916), the court, referring to a fireman who had been killed while running a switch engine "for the purpose of reaching out and moving an interstate car" declared:

"The purpose would control and the business would be interstate. The difference is marked between a mere expectation that the act done would be followed by other work of a different character, * * * and doing the act for the purpose of furthering the later work."

The injury for which compensation was sought in the Rolfe Case (Southern Pacific Co. v. Ind. Acc. Comm., 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E, 262 [Decemebr 14, 1916]), was the death of a flagman at a railroad crossing, who had been struck by a passing local train. The tracks at that point were used by both interstate and intrastate traffic. It was said:

"The duties of deceased * * * had to do directly with the keeping of an instrumentality of interstate commerce in suitable condition for the use of such commerce. And exactly as in the case of one engaged in repairing such an instrumentality after injury thereto has occurred, who concededly is engaged in interstate commerce, it is immaterial whether or not any interstate traffic was *immediately* to be had over the same. * * * In the light of what has already been decided by that court [the Supreme Court of the United States], we are of the opinion that *any work having for its immediate object, in whole or in part, the keeping of the track in condition for use according to schedule for interstate traffic has such a close and direct relation to interstate transportation as to be practically a part of it,* and that such work as deceased was engaged in at the time of his death was work of this character." (Italics ours.)

In Erie R. R. Co. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319 (December 18, 1916), the empolyee was a yard conductor, and it appeared that just previous to the accident he had been engaged in maneuvering a freight car into position where it could be included in an interstate train; that he was injured while returning to the yardmaster's office for orders; and that the orders awaiting him there required him to proceed immediately to make up an interstate train. The court continued:

"Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act *the true test is the nature of the work being done at the time of the injury,* and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act." (Italics ours.)

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Held, that the federal act did not apply.

The facts of the case and the decision reached by the court in Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54 (January 8, 1917), appear in the following excerpts from the opinion which we have italicized:

"The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line. * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury.' * * * That * * * is not sufficient to bring the case under the act. *This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other.* Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

On January 29, 1917, in B. & O. R. R. Co. v. Branson, 242 U. S. 623, 37 Sup. Ct. 244, 61 L. Ed. 534, the Supreme Court reversed the judgment of a Maryland trial court which had been affirmed by the Supreme Court of the state in 128 Md. 678, 98 Atl. 225. In that case the plaintiff, Branson, had suffered injury by inhaling the spray from a "paint gun," which he used in defendant's employ in painting engines and cars used in interstate commerce. He sued to recover under the federal Employers' Liability Act. Both the trial court and the state Supreme Court held that he was engaged in interstate commerce, and that the statute was applicable. The United States Supreme Court filed a memorandum opinion, reversing the judgment upon the authority of the Yurkonis, Harrington, Shanks, and Winters Cases.

Subsequently, on April 30, 1917 (243 U. S. 656, 37 Sup. Ct. 481, 61 L. Ed. 949), the Supreme Court, without comment, denied the petition filed by respondent commission for a writ of certiorari in the Rolfe Case, and on May 21, 1917 (244 U. S. 653, 37 Sup. Ct. 652, 61 L. Ed. 1373), a similar petition was denied, also without comment, in the Ruth Case.

On the last-mentioned day, the decision was filed in Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. In that case, "the employee was in charge of a switch engine in the carrier's extensive yard at Croxton, N. J., and was switching freight cars about in the yard, especially to and from a transfer station. * * * In some [cars] the freight was interstate, in others interstate and in still others it was of both classes. * * * In concluding his work for that day the employee took his engine to the place where it was to remain for the night, and started to leave the yard. His route lay across some of the tracks, and while passing over one he was struck by an engine, and received injuries from which he soon died. * * * In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. * * * Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole. * * * His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purpose of no importance."

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Southern Pacific Co. v. Ind. Acc. Comm., 178 Cal. 20, 171 Pac. 1071 (March 25, 1918), was a case where compensation was sought for the death of one Butler, caused by electrocution while Butler was working for petitioner as an electric lineman. The opinion states that petitioner "operates a system of electric railway lines, * * * its cars being used in both intrastate and interstate commerce," and continues:

"The opinion in the Shanks Case refers to a number of earlier cases in which, upon varying facts, the federal statute has been held to be applicable or inapplicable. Upon examination of these decisions it will be found that each case turned upon the peculiar facts of the employment in question. It may be said, however, that *the decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation.*" (Italics ours.)

The award was affirmed on the authority of the Harrington Case.

In Southern Pacific Co. v. Ind. Acc. Comm., 179 Cal. 59, 175 Pac. 453 (September 30, 1918), the employee, Morton, was a member of a repair crew in petitioner's Bay Shore Freightyards, engaged in repairing cars, some of which carried intrastate and others interstate shipments. He was killed by an empty car while proceeding across the yard from one repair shop to another. After quoting from Erie R. R. Co. v. Winfield, supra, the court said:

"By the same process of reasoning the decedent, whose general employment was to repair cars containing interstate and intrastate freight in the yards of the petitioner, was employed in interstate commerce while passing through the yard from one such car to another."

The facts in N. Y. Central R. R. Co. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536 (March 3, 1919), show that compensation had been awarded under the New York Compensation Act for the death of an employee who was killed by a passenger train while shoveling snow from certain tracks which "were used for the purpose of transporting * * * both interstate and intrastate commerce." It was held that he was engaged in interstate commerce, and therefore that the state statue was not applicable.

In Phila., B. & W. R. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. 869 (May 19, 1919), the employee was engaged as cook in a construction crew, whose duty it was to move from one point to another repairing bridges, and who lived in a "camp car." The car was standing upon a sliding near an abutment on which the crew were working, when another train collided with it, causing the injuries from which plaintiff sought to recover under the federal act. The court affirmed the judgment rendered in his favor, saying:

"The relation of plaintiff's work to the interstate commerce of his employer would seem to be rather remote. But upon a closer examination of the facts the contrary will appear. * * * The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work. * * * He was employed, as they were, in interstate commerce."

On the same day the opinion was filed in Kinzell v. C., M & St P. Ry. Co., 250 U. S. 130, 39 Sup. Ct. 412, 63 L. Ed. 893. In that case the employee was a member of a repair crew which was making a "fill' for a bridge used by interstate trains. At the time of the injury the earth had been heaped up over the track, and the employee was engaged in coupling a "scraper" to a train of cars in order to clear the earth from the track. The court declared:

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"The doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the act." (Italics ours.)

The award in the Butler Case was annulled on January 5, 1920. 251 U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. ——. We quote from the opinion:

"Certainly, when applicability of the federal Employers' Liability Act is uncertain, *the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it.* * * * Applying the suggested test, we think these circumstances suffice to show that his the [employee's] work was directly and immediately connected with interstate transportation and an essential part of it." (Italics ours.)

On May 17, 1920, the decision was filed in Erie R. R. Co. v. Collins, 252 U. S. ——, 40 Sup. Ct. 450, 64 L. Ed. ——. It appeared that—

"The plaintiff as an employee of defendant operated a signaling tower and water tank, * * * the tower being used for the operation of trains in interstate and intrastate commerce. The tank was used for supplying the locomotives of the trains with water, which was pumped from a closeby well into the tank by a gasoline engine which plaintiff ran. In the nighttime of December 25, 1915, while plaintiff was engaged in starting the engine the gasoline suddenly exploded, burning him."

The court continued:

"They [the cases relied upon below] all dealt with considerations dependent upon the distinctions of fact and law between interstate and intrastate commerce. A distinction, it may at once be said, is plain enough so far as the essential characteristics of the commerces are concerned, but how far instruments or personl actions are connected with either and can be assigned to either becomes in cases a matter of difficulty, and ground, it may be, of divergent judgments. * * * In Pedersen v. Del., L. & W. R. R. Co., 229 U. S. 146, it was held that one carrying bolts to be used in repairing an interstate railroad, and who was injured by an interstate train, was entitled to invoke the Employers' Liability Act. * * * And it was said, citing cases: *'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?'* * * * In the Winters Case the work was repairing an engine. The engine, it was said, had no definite destination. 'It simply had finished some interstate business and had not as yet begun upon any other.' As to such instrumentalities the determining principle was said to be that their character depends upon their 'employment at the time, not upon remote probabilities or accidental later events.'

"In the Puckett Case an employee (car inspector), going to the relief of another employee, stumbled over some large clinkers in his path while carrying a jack for raising a derailed car. It was decided that he was engaged in interstate commerce, the purpose being to open the way for interstate transportation.

"These, then, being the cases, what do they afford in the solution of the case at bar? As we have said regarding the essential character of the two commerces, the differences between them is easily recognized and expressed, but, as we have also said, whether at a given time particular instrumentalities or employment may be assigned to one or the other may not be easy, and of this the cases are illustrative. What is their determining principle?

"In the Pedersen Case it was said that the questions which naturally arise: 'Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely con-

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nected therewith as to be a part of it?' Or, as said in Shanks v. D., L. & W. R. R. Co.,supra, Was the 'work so closely related to it (interstate commerce) as to be practically a part of it'? The answer must be in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes therefore within the indicated test."

Erie R. R. Co. v. Szary, 252 U. S. ——, 40 Sup. Ct. 454, 64 L. Ed. —— (decided on the same day), was a case where the employee was injured while engaged in "sanding engines whose destinations were other states." It was held that he was engaged in interstate commerce.

In Phila. & R. Ry. Co. v. Hancock, 251 U. S. ——, 40 Sup. Ct. 512, 64 L. Ed. —— (June 1, 1920), the employee was killed while operating a train of cars loaded with coal. While "the duties of the deceased never took him out of Pennsylvania," nevertheless the coal which he was moving at the time of his death was consigned to another state. It was held that—

"The coal was in the course of transportation to another state when the cars left the mine. *There was no interruption of the movement; it* always continued towards points as originally intended. *The determining circumstance is that the shipment was but a step in the transportation of the coal to* real and ultimate destinations in *another state.*" (Italics ours.)

The award of compensation, under the state Workmen's Compensation Act, was therefore annulled.

From the foregoing authorities these principles are deducible: The general test as to the character of the employment is whether the employee was engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof. Thus, where the instrumentality upon which he was working was operating exclusively in interstate commerce, as in the Parker and Szary Cases; or where the work which he was performing at the time of the accident would have the immediate effect of furthering interstate traffic, as in the Carr, Rolfe, Butler, Porter, Smith and Collins Cases; or where the employee had not yet completed his day's work, which included both interstate and intrastate transportation, as in the Winfield Case; or where the instrumentality upon which he was laboring was a car loaded with commodities consigned to or from other states, as in the Horton and Hancock Cases—an action under the federal Employers' Liability Act is the exclusive remedy. But where the employee's work was not remotely connected with interstate commerce, as in the Yurkonis, Shanks, Harrington, Barlow, and Branson Cases; or where the employee had completed a task which involved interstate traffic, and had not yet commenced a new task, as in the Welsh Case; or where the instrumentality upon which the employee was working was, at the time of the injury, neither engaged in, nor loaded with, interstate traffic, as in the Winters Case, then compensation may be awarded under a state compensation act. As was said by this court in the Butler Case:

"The decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation."

[3] Applying these principles to the facts herein, we think that, at the time Brizzolara received the injury which caused his death he was not engaged in interstate commerce. The engine which he was repairing was not used exclusively in such commerce. Indeed, as was said in the Winters Case:

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"An engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined * * * to anything more definite than such business as it might be needed for."

It had been withdrawn from all traffic. To paraphrase the language of the Harrington Case, it is not important whether the engine had previously been engaged in interstate commerce or that it was contemplated that it would be so engaged after this immediate duty had been performed. And this further excerpt from the opinion in the Winters Case is pertinent:

"Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

We quote from Chicago, R. I. & P. R. Co. v. Cronin (Okl.) 176 Pac. 919:

"We cannot agree with the plaintiff in error that this broken down engine was in interstate commerce at the time of the accident; indeed, it was not in commerce of any kind. It was 'dead,' undergoing the repairs necessary to placing it in commerce."

It is urged by petitioner that—

"The denial of the petition for a writ of certiorari in the Ruth Case should be regarded as authority, and therefore the decision of this court should control in the case at bar."

[4] It seems plain that our holding in the Ruth Case cannot be reconciled with that in the Winters Case. It is true that a writ of certiorari in the former was denied some four months after the decision in the latter. Whatever the grounds may have been for the denial of the writ, we cannot, in the face of the clear and unequivocal statement of the rule in the Winters Case, wholly at variance with the conclusion in the Ruth Case, regard the latter as controlling here. In both cases the employee was injured while working on an engine which was customarily used in both interstate and intrastate traffic, and in both cases it had been withdrawn from such service for repairs. As we said in the Ruth Case:

"No fixed rule for the construction of this statute has been laid down by the Supreme Court of the United States."

But, as we have shown, that court has since had occasion to construe the federal Employers' Liability Act, and we must accept its declarations on the point in question as the settled law.

It follows that at the time of the accident Brizzolara was not "engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof."

The award is affirmed.

We concur: Angellotti, C. J.; Olney, J.; Shaw, J.; Lennon, J.; Sloane, J.

WILBUR, J. (dissenting). I dissent. It is conceded that the facts of this case bring it squarely within the rule laid down in Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E. 916 (which will hereinafter be referred to as the Ruth Case), and that if we follow that case the award should be annulled. The Ruth Case, however, is overruled by the main opinion upon the theory that the Supreme Court of the United States in Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54 (which will hereinafter be referred to as the Winters Case), has determined the same matter directly contrary to the rule laid down by us in the Ruth Case. This view is entertained, notwithstanding the fact that the Supreme Court of the United States declined to issue a writ of certiorari

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to review the decision of this court in the Ruth Case, and that this action was had after the decision in the Winters Case. It seems to me that there is a clear distinction between the Winters Case and the Ruth Case. The facts in the Winters Case were stipulated. It appears therefrom that the engine "had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury." It will be observed that the stipulation does not cover the customary use of this engine. It had been used before and was used after the accident in hauling intrastate and interstate commerce. It was under this condition of the record that the court said:

"Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended upon its employment at the time, not upon remote probabilities or upon accidental later events."

Of course when an engine is laid up in a machine shop for repairs it is not actually engaged in interstate commerce, and if its character as an instrument of commerce is to be determined by what it is doing when it is doing nothing, it follows that no engine while undergoing repairs is engaged in interstate commerce. It is clear from the opinion that no such result was intended, for it is expressly inferred that had it been "interrupted in an interstate haul to be repaired and go on," it would have been held that the engine was employed in interstate commerce, and those repairing it engaged therein. Again it is said:

"This is not like the matter of repairs upon a road permanently devoted to commerce among the states."

The inference in this statement is that if the engine had been permanently devoted to interstate commerce, as is a bridge, that those in its repair would be engaged in interstate commerce. In this case we are dealing with a switch engine which, by reason of its construction and the character of its business, is permanently devoted to the handling of freight and passenger cars in the railroad yards in San Francisco, and which is used for both interstate and intrastate commerce. There is no time when it could be said that the engine while in actual operation was not engaged in interstate commerce. Why, then, is it any less an instrumentality of interstate commerce than a bridge in the main line of a railway which most of its time is unused, and when in use is traveled indiscriminately by interstate and intrastate commerce? As pointed out in the main opinion, in Philadelpha, B. & W. R. R. Co. v. Smth, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. 869, the cook of a construction crew, engaged in repairing a bridge upon a railroad engaged in interstate business, was held to be engaged in such interstate commerce while serving as a cook. The court say:

"The significant thing, in our opinion, is that he was employed by the defendant to assist, and * * * was assisting the work of the bridge carpenters by keeping their bed and board close to their place of work."

It is further said:

"Taking it to be settled by the decision of this court in Pedersen v. Delaware Lackawanna & Western R. R. Co., 229 U. S. 146, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely realted to defendant's interstate commerce as to be in effect a part of it."

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If we turn to the case of Pedersen v. Delaware, Lackawanna, etc., Co., supra, we will see that the repair of engines and cars and the repair of bridges and tracks are placed upon exactly the same footing. It was there said:

"Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. *Tracks and bridges* are as indispensable to interstate commerce by railroad as are *engines* and *cars*, and sound economic reasons unite with settled rules of law in *demanding that all of these instrumentalities be kept in repair*. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its *cars, engines*, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? [Citing cases.] Of course we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." (Italics ours.)

In the Pedersen Case the rule adopted by the Supreme Court of the United States applied with equal force to a bridge and an engine. In the Ruth Case we made the application of the principle there stated to an engine. I think that this case was correctly decided, and that the Winters Case was not a departure from the rule laid down by us or the rule laid down by the Supreme Court of the United States in the Pedersen Case, but depends upon its own peculiar facts and the narrowness of the stipulated facts. The whole point of the Winters Case is that the Supreme Court of the United States felt itself unable to say, under the admitted facts, that the engine there involved was permanently used in, or, if I may use the expression, dedicated to, interstate commerce. Here we have an engine which, by reason of its peculiar construction, is and at all times has been as much dedicated to interstate commerce as is a bridge upon the main track of a railroad. In the Pedersen Case it was assumed that engines and cars were obviously instrumentalities used in interstate commerce, and from that predicate it was argued that a bridge was eqully such an instrumentality. The main opinion assumes that a bridge is such an instrumentality, but denies that an engine undergoing repairs is such an instrumentality, notwithstanding the fact that it was at all times used in interstate commerce.

I dissent for the further reason that we have expressly decided the very question involved in this case; that the principle involved is well settled and of universal application; that the only difficulty is that of applying it to the specific facts in each case; that we have already made such an application; that the Supreme Court of the United States has never undertaken to change or modify the general rule; that the Winters

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Case is different in its facts, and that, so far as we can determine from the published opinions of the Supreme Court of the United States, they have distinctly approved our decision in the Ruth Case. I think we ought not to assume that the Ruth Case is reversed by reason of the holdings in the later cases of the Supreme Court of the United States, which merely apply the well-settled rule to the peculiar facts of each case, which are in every instance different from those in this case.

FIDELITY & CASUALTY CO. OF NEW YORK ET AL. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.

(Civ. 3303.)

(District Court of Appeal, Second District, Division 1, California. July 19, 1920.)

192 Pacific Reporter, 166.

MASTER AND SERVANT—COMPENSATION CLAIMANT'S INJURY WHILE ON WAY TO WORK, HELD NOT ONE "GROWING OUT OF AND INCIDENTAL TO EMPLOYMENT."

An employee's injury was not received when "performing service growing out of and incident to his employment and acting within the course of his employment," as required by Workmen's Compensation, Insurance and Safety Act; he for his own convenience having left his place of employment at a garage during his regular hours of employment, and having been injured while returning there after such hours to attend to some unfinished duties, ordinarily performed when on duty, though in addition to his fixed hours of employment he was subject to emergency calls.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Award of compensation was made by the Industrial Accident Commission of California to Arthur H. Johnson, injured employee of the Pure Milk Dairy Company, and the Fidelity & Casualty Company of New York, insurance carrier, and the employer brings writ of review. Award annulled.

Jennings & Belcher, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

CONREY, P. J. Writ of review to determine the validity of an award, made by the Industrial Accident Commission in favor of one Arthur H. Johnson and against the Pure Milk Dairy Company, a corporation, and its insurance carrier.

The dairy company, as a distributor of milk in the city of San Diego, operated five automobile delivery wagons and maintained a garage for their care and repair. Johnson was employed as foreman of the garage, and was furnished with a Ford automobile to be used in connection with his employment. He was permitted to use the automobile incidentally

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for his personal convenience, and kept the automobile at his home during the time when he was at home. Johnson's regular hours of employment were from 7 a. m. until 6 p. m. He was also expected to respond to emergency calls at any time, and the company maintained a telephone at Johnson's home, in order that he might be called at any time when required out of the regular hours by the emergencies of the business.

On the 19th day of April, 1919, having in view some affairs relating solely to his personal convenience and pleasure, Johnson left the garage at about 5 o'clock in the evening and drove the Ford car to his home and to several other places in the performance of his personal errands. After attending to these matters he went to his home, took off his working clothes, and dressed for the purpose of keeping a social engagement of the evening. He then started from his home to the garage for the purpose of attending to some unfinished duties there prior to keeping said social engagement. On his way to the garage, in suddenly turning his car to avoid collision with a motorcycle, the car was overturned, and Johnson received the injuries for which he sought to obtain compensation, and on account of which an award was made by the Industrial Accident Commission.

The question for decision is tersely stated by counsel for petititioners as follows:

"Should compensation be awarded to an employee who, purely for his own purposes, leaves his place of employment before his day's work is finished and, several hours later, is injured upon the public streets when returning to his place of work?"

This question (except only that the applicant had not left his employer's place of business at an unusual time) was presented to this court in Zbinden v. Industrial Accident Commission, No. 1902. Compensation having been denied by the Industrial Accident Commission, the applicant applied for a writ of review. The petition was denied without written decision; this court being then of the opinion that, as determined by the commission, an accident occurring under the circumstances stated did not arise out of or happen in the course of the applicant's employment. The accident in that case consisted in a collision between an electric railway car and an automobile, in which the applicant was riding while on the way from his home to the place of employment. We think that that case was correctly determined, and it is directly in point in this case.

"In the very broadest sense, of course, it is true that an injury which happens to a man who is on his way to his place of employment is an injury 'growing out of and incidental to his employment,' since a necessary part of the employment is that the employee shall go to and return from his place of labor. But it is to be noted that the right to an award is not founded upon the fact that the injury grows out of and is incidental to his employment. It is founded upon the fact that the service he is rendering at the time of the injury grows out of and is incidental to the employment. Therefore an employee going to and from his place of employment is not rendering any service, and begins to render such service only when, as has been said, arriving at the place of his employment, he proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks." Ocean Accident, etc., Co. v. Industrial Accident Commission, 173 Cal. 313, 322, 159 Pac. 1041, 1044 (L. R. A. 1917B, 336).

Under the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), the employee is entitled to compensation for injuries received by him only where, at the time of the in-

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jury, the employee is "performing service growing out of and incidental to his employment and is acting within the course of his employment." In order to establish his right to compensation, the employee must affirmatively prove that at the time of the injury the condition existed which is thus described in the statute.

Respondents have endeavored to sustain the award made herein by suggesting that through the necessities of business there are two well-defined classes of employees, between whom there rests a sharp line of distinction; the first class consisting of men whose hours of labor are fixed, and who have little or no authority or responsibility, and the second class, consisting of "those individuals who are vested with both authority and responsibility, whose hours of labor are not sharply defined, and whose responsibility may call them to go upon their employers' business at any and all hours of the day or night." It is contended that Johnson belonged to the second class, and that he was "on duty 24 hours of the day, whenever the service of the company required, or when he was ordered, or when in his judgment something was required to be done for the company's welfare"; that therefore, since in his judgment it was necessary for him to go to the garage on the evening in question to see that certain things had been done, he should be regarded as having been occupied in his employer's service while on his way back to the garage.

We think that this contention results in a broad and indefinite description of Johnson's duties, not warranted by the evidence. The evidence shows without conflict that his hours of employment were fixed, although in addition thereto he was subject to call for duty at other hours when the work called for was such as could not be performed in the ordinary course of his daily duties at the garage. This is far from being an employment which kept him in the service of the company at all times and places. When he left the garage for his convenience and pleasure, he was not engaged in the service of his employer, and would not be so engaged until his actual return to the place of employment, unless, possibly, in some exceptional instances, such as when he might be notified to repair or otherwise care for a milk wagon, which had broken down somewhere on the road. But there is no evidence that any such emergency had arisen. The sole claimed purpose of his intended return to the garage was for the performance of duties at that place, which were such duties as were ordinarily performed by him when on duty at the garage. The conclusion necessarily follows that the employee's injuries were not received at a time when he was performing service for his employer or acting within the course of his employment.

The award is annulled.

We concur: Shaw, J.; James, J.

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POPST ET UX. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(Civ. 3380.)

(District Court of Appeal, Second District, Division 2, California. July 21, 1920.)

192 Pacific Reporter 296.

1. MASTER AND SERVANT — COMPENSATION TO DEPENDENTS RECEIVING FLUCTUATING AMOUNTS FOR SUPPORT HELD DISCRETIONARY.

Since Workmen's Compensation, Insurance and Safety Act 1917 prescribes no rule for determining the "annual amount" devoted by deceased employee to the support of dependents, where his contributions for support during the year preceding death have not been constant, either in amounts or times of payment, the determination of what is such amount rests in the sound discretion of the commission, based on the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 386[1].)

2. MASTER AND SERVANT — COMPENSATION AWARD TO DEPENDENTS HELD A FINDING OF FACT, NOT REVIEWABLE; "DETERMINATION OF QUESTION OF FACT."

In a proceeding by parents, claiming benefits under Workmen's Compensation, Insurance and Safety Act 1917, § 9, par. 3, subd. 2, as amended by St. 1919, p. 917, § 4, for death of a son, who had contributed to their support irregularly and in differing amounts, so that the "annual amount" was not capable of any mathematically exact measurements, a conclusion of the Industrial Accident Commission as to what is the "annual amount" within the statute is the determination of a question of fact, within section 67, subd. (c), and not subject to review if there is any evidence to support it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Proceeding by Hermon D. Popst and Mary M. Popst under the Workmen's Compensation Act to obtain compensation for the death of a son, Lynn Popst, opposed by the Los Angeles Gas & Electric Corporation, the employer. There was an award of less compensation than was claimed, and the applicants bring certiorari. Petition denied.

Benj. M. Stansbury, of Riverside, for petitioners.
A. E. Graupner, of San Francisco, for respondents.

PER CURIAM. This is a proceeding in certiorari, having for its purpose the modification of an order of the IndustrialAccident Commission whereby these petitioners, the parents of Lynn Popst, who died as the result of injuries sustained in the course of his employment, were awarded a certain amount as a death benefit under subdivision 2 of paragraph 3 of section 9 of the Workmen's Compensation, Insurance and Safety Law (Stats. 1919, p. 917). The commission found that petitioners were partially dependent upon their son for their support at the time of his death, and that the "annual amount" that he so devoted to their support was $400.

[1] Nowhere in the Workmen's Compensation, Insurance and Safety Law is any rule or basis prescribed for the determination of what shall be deemed to be the "annual amount" devoted by a deceased employee to the supoprt of his dependents, where, as here, the sums contributed to such support during the year preceding the demise of the injured employee

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have not been constant, either in amounts or times of payment. In the very nature of the case, the determination of what is such "annual amount," when, as here, the support contributed by the injured employee has fluctuated considerably during the year preceding his demise, must largely rest in the sound discretion of the commission, based upon the evidence before it.

[2] The deceased employee, Lynn Popst, was injured while in the employ of the Los Angeles Gas & Electric Corporation. During the greater portion of the year immediately preceding the accident he had been in the service of the United States navy. After his discharge from the navy he was unemployed for a considerable period. While in the navy he had contributed a much smaller sum to the support of his parents than during the comparatively short period that he was in the employ of the gas and electric corporation. Petitioners, who are dissatisfied with the amount allowed them by the commission in its award for partial dependency, say that the commission's method of computing the "annual amount" contributed by their son to their support was incorrect. But the commission did take evidence upon the subject, and made its finding upon such evidence. Under the circumstances, the "annual amount" was not capable of any mathematically exact measurement. The conclusion of the commission that, at the date of their son's death, $400 was the annual amount contributed by him to his parents' support, was the determination of a question of fact, based upon evidence adduced before and considered by the commission.

Without intimating that the method of computation adopted by the commission was erroneous or unreasonable, our conclusion is that this court has no power to set aside the award or to remand the case for further proceedings.

"The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review." Subdivision (c), § 67, of the Act; Stats. 1917, p. 876.

"Our authority, with respect to the commission's conclusions on questions of fact, goes no further than to permit the annulment of an award where the commission's finding of a fact is without any evidence whatever to support it. Where there is a conflict in the testimony, or where opposing inferences may reasonably be drawn, the commission is the final arbiter." Walker v. Industrial Acc. Com., 177 Cal. 738, 171 Pac. 954, L. R. A. 1918F, 212.

See, also, Williams v. Industrial Acc. Com. (Sup.) 177 Pac. 989; San Francisco-Oakland, etc., Rys. v. Industrial Acc. Com. (Sup.) 179 Pac. 386; Frankfort Gen. Ins. Co. v. Pillsbury. 173 Cal. 56, 159 Pac. 150; Crosaro v. Industrial Acc. Co., 38 Cal. App. 758, 177 Pac. 489.

What was said by the New York Supreme Court in Rhyner v. Hueber Bldg. Co., 171 App. Div. 58, 156 N. Y. Supp. 904, is worth quoting here:

"The appellant contends that the method of computing the deceased's wages was incorrect. We think the conclusion reached by the commission was correctly worked out. Of course, we are unable to say what mental processes the commission employed in arriving at the figures given in their decision; but it seems to us that under the evidence, the figures given might, very properly, have been the the result of the method of computation pointed out in subdivision 3 of section 14. But here again a finding of fact, based upon evidence, is presented to us. and we are powerless to criticize, modify, or revoke. It is not well for this court to fall into the habit of discussing the facts, even for the purpose of showing that the findings of fact are reasonable and meet with our approbation. We cannot, except by usurpation, invade the realm of facts; for it was the clear intent of the Legislature that 'the decision of the commission shall

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be final as to all questions of fact.' Of course, if there are no facts, and the decision is arbitrary, unfair, and unreasonable, a question of law arises, and we may right the wrong. Matter of Lizzie Gardener v. Horseheads Construction Co., 156 N. Y. Supp. 899, handed down herewith.' But it is wholly improbable that the commission will make any such decision. The commission is the sole judge and the 'final' judge of the facts, and this court is not only forbidden to trespass upon the jurisdiction of the commission in this field, but, by section 20 of the act, it is circumscribed, even, in its review of questions of law. It was the purpose of the Legislature to create a tr.bunal to do rough justice—speedy, summary, informal, untechnical. With thls scheme of the Legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to techn.cality."

The petition for the writ is denied.

WESTERN INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3378.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1920.)

192 Pacific Reporter 109.

MASTER AND SERVANT — PETITION FOR CERTIORARI DENIED FOR WANT OF REPLY TO ANSWER.

A petition for certiorari to review an order of the Industrial Accident Commission in a proceeding under the Workmen's Compensation Act will be denied. where the petitioner neglects the privilege, under Supreme Court rule 26, subd. 4 (183 Pac. viii), of filing a reply to the commission's answer showing that the findings complained of are sufficiently supported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

Application by the Western Indemnity Company to review an order of the Industrial Accident Commission of California, in which Will J. French, A. J. Pillsbury, and A. H. Naftzger were named as respondents. Application denied.

Duke Stone, of Los Angeles, for petitioner.
A. E. Graupner. of San Francisco, for respondents.

PER CURIAM The Industrial Accident Commission has served and filed an answer, from which it appears that the findings of which petitioner complains are sufficiently supported by the evidence. Petitioner has neglected to file a reply to the answer, though the privilege of such reply is accorded him by the rules promulgated by the Supreme Court (subdivision 4, rule 26, 183 Pac. viii).

Petition denied.

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PETTIT v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA. (Civ. 3387.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1920.)

192 Pacific Reporter 109.

MASTER AND SERVANT — PETITION FOR CERTIORARI, NOT STATING MATERIAL EVIDENCE, DENIED.

A petition for cetiorari to review order of the Industrial Accident Commission on ground of want of evidence to warrant finding as to disability, not stating the material evidence relative to such point, as required by Supreme Court rule 26, subd. 4 (183 Pac. viii), will be denied.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

Application for certiorari by T. J. Pettit against the Industrial Accident Commission of California, to review an order of the Commission. Petition denied.

Archie D. Mitchell, of Ontario, for petitioner.

A. E. Graupner, of San Francisco. for respondent.

PER CURIAM. The petition, in substance and effect, is based upon a want of evidence sufficient to warrant the conclusion of the commission that petitioner's disability terminated September 8, 1919. No attempt is made to state "all the material evidence" relative to this point. The petition, therefore, fails to comply with the rules promulgated by the Supreme Court (subdivision 4, rule 26, 183 Pac. viii.)

Petition denied.

IROQUOIS IRON CO. v. INDUSTRIAL COMMISSION et al. (No. 13215.)

(Supreme Court of Illinois. June 16, 1920. Rehearing Denied October 7, 1920.)

128 Northeastern Reporter 289.

6. MASTER AND SERVANT — COMPENSATION CLAIMANT EMANCIPATED BY ENLISTMENT HELD NOT A DEPENDENT.

Where an employee's minor son enlisted in the marines for a four-year term, so that he would reach maturity before his enlistment expired, his emancipation from paternal control was brought about by his voluntary act of himself and his father, who consented, and the father was not under legal obligation to support the son when he received a fatal injury to entitle the son to compensation under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

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Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act by Raymond P. Olesen, administrator, for compensation for death of Peter W. Olesen, the employee, opposed by the Iroquois Iron Company, the employer. Compensation was awarded, the award confirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

Knapp & Campbell, of Chicago (J. L. Earlywine, of Chicago, of counsel), for plaintiff in error.

Shelley B. Neltnor and Einar C. Howard, both of Chicago, for defendant in error.

THOMPSON, J. October 14, 1918, Peter W. Olesen was killed while in the employ of the Iroquois Iron Company, plaintiff in error. He left surviving him Mary Olesen, who obtained a divorce from him in 1914 on the ground of habitual drunkenness, Raymond P. Olesen, 22 years old, and Reginald W. Olesen, 20 years old. The elder son, as administrator of his father's estate, filed his application for compensation before the Industrial Commission, naming the widow as the beneficiary. At the hearing before the arbitrator the petition was amended, making the younger son the beneficiary. The arbitrator found that no amount was payable under paragraphs (a), (b), (c), or (d), of section 7 of the Compensation Act (Laws 1913, p. 335), and awarded the sum of $150 for burial expenses in accordance with paragraph (e) of that section. On the hearing on review the finding of the arbitrator was reversed, and the Industrial Commission found "that the deceased left him surviving a son, Reginald W. Olesen, whom the deceased was under legal obligation to support," and awarded to the applicant $3,500 compensation in accordance with paragraph (a) of section 7 of the act. On certiorari this decision of the Industrial Commission was confirmed by the circuit court of Cook county, and this court has granted leave to prosecute this writ of error to review that judgment.

The only question presented for review is whether deceased was "under legal obligation to support" his son Reginald at the time of the injury which resulted in his death. When Mrs. Olesen obtained her divorce she was awarded the sole care, custody, and education of the children, and deceased was ordered to contribute and pay $5 each week toward the support of Reginald, who was then 15 years of age. Both the sons lived with the mother for a short time, and then Reginald went to live with his father. They roomed together, the father paying the room rent. During the summer of 1915 Reginald was employed at Field's. He kept all the money he earned and fully provided for himself. October 3, 1915, he enlisted with the United States marines for a period of four years. This enlistment was without the knowledge of the mother, but was with the father's consent. Deceased and the elder brother in June, 1918, each sent $30 to Reginald, who was stationed in Florida, to pay his fare home on a furlough. At another time they sent him $45 to help defray the expenses of a civilian physician when Reginald had his eye injured in the service. According to Reginald's testimony, his father sent him $10 a month in currency, but he had no letters or receipts covering the amounts, because, as he said, they were required to burn such things during the "flu" epidemic. His pay was $14.80 a month while he was a private. October 4, 1917, he was made a corporal, and his pay was increased to $36. A month later he was advanced to the rank of sergeant at $38 a month. The government furnished him his meals, clothing, and living quarters. The only things it was necessary for him to purchase

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were toilet articles, such as tooth paste and soap. If he wanted extra food, his uniform pressed, or other extras not included in the army list, he was required to pay for these items with his own funds.

[1-7] It seems too clear to require argument that Reginald Olesen was not dependent upon his father for support, but the question of dependency is not controlling here. The question we are called upon to determine is whether the deceased was under legal obligation to support this son at the time of the injury. This question is not only new in this state, but seems to be one that has not had the attention of courts of last resort or other states that have been called upon to construe Workmen's Compensation Acts. Generally speaking, when a child arrives at the age of majority the parent is no longer under legal obligation to support him. On the other hand, the parent is usually under a legal obligation to support his minor children. When a child who is physically and mentally able to take care of himself voluntarily abandons the parental roof and leaves its protection and influence and goes out to fight the battle of life on his own account, the parent is no longer under legal obligation to support him. Hunt v. Thompson, 3 Scam. 179, 36 Am. Dec. 538. If a boy has attained an age at which he is capable of supporting himself, neither justice, reason, nor the law requires the parent to maintain him in idleness. Emancipation is inferred where the child contracts for his services and collects and uses his own earnings. Scott v. White, 71 Ill. 287; 20 R. C. L. 610; 29 Cyc. 1675. When a minor enlists in the military service of this country, he ceases to be a part of his father's family, and puts himself under the control of the government, and is consequently emancipated so long as this service continues. 21 Am. & Eng. Ency. of Law (2d Ed.) 1060; Com. v. Morris, 1 Phila. 381; Baker v. Baker, 41 Vt. 55; Gapen v. Gapen, 41 W. Va. 422, 23 S E. 579. Enlistment is a contract between the soldier and the government, which involves a change in his status, which cannot be thrown off by him at his will. In re Grimley. 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636. Emancipation works a severance of the filial relation as completely as if the child were of age. Whether there has been an emancipation is a question of fact, but what is emancipation is a question of law. The facts in this case are undisputed, and whether or not the deceased, in view of the undisputed facts in this record was under legal liability to support his son who has enlisted in the military service, is a question of law which this court must determine. Reginald Olesen was born July 21, 1898, and therefore would arrive at his majority before his term of enlistment expired. The emancipation of this son was brought about by the voluntary act of the parent and the child, and we think, both on authority and principle, it must be held that deceased was not under legal obligation to support his son at the time of the injury in question.

The judgment of the circuit court is therefore reversed, and the cause is remanded to the circuit court of Cook county, with directions to remand the cause to the Industrial Commission, with directions to confirm the finding of the arbitrator.

Reversed and remanded, with directions.

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WABASH RY. CO. v. INDUSTRIAL COMMISSION et al. (No. 13258.)

(Supreme Court of Illinois. June 16, 1920. Rehearing Denied October 7, 1920.)

128 Northeastern Reporter 290.

1. MASTER AND SERVANT — "EMPLOYMENT" WITHIN COMPENSATION ACT DEFINED.

Under Workmen's Compensation Act, the employment is not limited to the exact moment when the workman reaches his place of work, or to the exact moment when he ceases work, and it necessarily includes a reasonable time and space before and after ceasing actual employment, having in mind all of the circumstances.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Employment.)

2. MASTER AND SERVANT — RAILROAD EMPLOYEE'S INJURY WHILE LEAVING AFTER DAY'S WORK HELD ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT," WITHIN COMPENSATION ACT.

Where a railroad roundhouse mechanic was killed by a switch engine after he had finished his day's work and while he was walking along the tracks on the railway premises to a point where, according to known custom, he intended to catch a train on which he and other employees were allowed to ride home, the accident was one" arising out of and in the course of the employment," within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Error to Circuit Court, Madison County; Louis Bernreuter, Judge.

Application under the Workmen's Compensation Act for compensation by Julia Miller, as administratrix of the estate of Charles Miller, deceased, employee, against the Wabash Railway Company, employer. An award by the Industrial Commission in favor of claimant was on certiorari quashed by the circuit court an judgment entered for the employer, and the claimant brings error. Judgment of circuit court reversed. and award of Industrial Commission confirmed.

W. E. Hadley, of East St. Louis, for plaintiff in error.

Edward C. Kramer, Rudolph J. Kramer, and Bruce A. Campbell, all of East St. Louis (N. S. Brown, of St. Louis, Mo., of counsel), for defendant in error.

CARTER, J. Plaintiff in error filed an application for compensation under the Workmen's Compensation Act (Laws 1913, p. 335) for the death of her husband in 1917 on the premises of defendant in error, the Wabash Railway Company. The Industrial Commission entered an award in favor of the administratrix, but on review in the circuit court on writ of certiorari the record was quashed and judgment was entered in favor of defendant in error. The cause has been brought to this court by writ of error.

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Charles Miller lived with his wife and two children in Venice, Madison county, Ill., and at the time of the fatal accident was working as a machinist in repairing engines in the company's roundhouse at Brooklyn, in the same county. Power-driven machinery was used in the roundhouse. He worked there from 7:00 a. m. to 4:00 p. m. each day, and on the day of his death finished work in the roundhouse at the usual time and started walking down between two switch tracks on the railway premises, apparently to take a train for home. when he was struck by a switch engine and injured, so that he died soon after he was taken to the hospital.

The evidence tends to show that frequently employees whose places of residence were on the line of defendant in error's railway in the direction of Venice, in going to and leaving their work at the roundhouse, took the company's trains, though they could, and sometimes did, take street cars in going from Brooklyn to Venice and other towns in the vicinity. In order to reach the train of the Wabash Railway Company the employees, after leaving the roundhouse, usually walked down what was known as the "rip track" (or, as sometimes called in the testimony, tracks 10 and 11) to a point in front of the yard office and switchman's shanty, and it was while going along this track that the deceased was struck. George Eckard, another employee, on the evening of the accident was walking down the rip track (10) to take a train and he saw the deceased struck by the switch engine and injured. This witness testified there was no path here different from other parts of the yard on the premises of the railway company, but the tracks were covered with cinders, and men walked either down one of the tracks, or as we understand, on the cinders, just outside of the tracks; that Miller had taken that particular train two or three times a week for the previous three months; and that witness had seen as many as 20 or more of the employees take the same train. There was other evidence in the record tendnig to support the testimony of Eckard that the employees frequently took this train and walked across the yard in the same way that the deceased walked. The foreman of the Wabash roundhouse testified that since Miller had been employed there in October, 1913, it was the custom of the employees to walk through the yard in the way he was walking and to ride on the train free, so far as witness knew. The evidence shows there was no contract with Miller relative to furnishing him transportation to or from his work. Some of the employees who had worked for the company over five years had passes. Miller had not worked for it that long. When he rode on the train he was not charged fare by the railway company, nor were any of the men who worked for the company. The conductor would simply go through the car, recognize the passengers who were railroad men, and pass them without tickets. There were no instructions from the railway authorities for the men to take that train and no orders of any kind in regard to the matter. The evidence also shows that when Miller did not take the train going to and from his work he took a street car, which ran every 10 or 15 minutes between Brooklyn and Venice.

[1, 2] The principal question here argued is whether Miller's accident arose out of and in the course of his employment. His work in the roundhouse was completed at 4 o'clock, and the evidence tends to show that he could take a street car to his home and thus avoid walking down the tracks in the yard of defendant in error, but it also appears by the weight of the evidence in the record that there was a custom on the part of many of the employees to go down the tracks to take a train, and that this custom was known to the officials of the railway company who were in charge of the work at the roundhouse. This court has held that an injury occurring to an employee while on his way to or from his work may or may not arise out of and in the course of the employment, de-

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pending upon the special facts of the particular case. Fairbank Co. v. Industrial Com., 285 Ill. 11, 13, 120 N. E. 457, 458. The court said in that case:

"When work for the day has ended and the employee has left the premises of his employer to go to his home the liability of the employer ceases, unless after leaving the plant of the employer the employee is incidentally performing some act for the employer under his contract of employment."

It is clear from this record that the accident occurred on the premises of the employer, as that word is ordinarily understood.

One of the controlling factors in determining the question here under consideration is whether the employee at the time of the accident was within the orbit, area, scope, or sphere of his employment. The usual rule followed in workmen's compensation cases appears to be that a man's employment does not begin until he has reached the place where he is to work or the scene of his duty and does not continue after he has left the premises of his employer (Bradbury on Workmen's Comp. [3d Ed.] 468), and it is ordinarily held that if an employee is injured on the premises of the employer in going to or from work he is entitled to compensation for such injuries (1 Honnold on Workmen's Comp. § 122; Bradbury on Workmen's Comp. [3d Ed.] 473, and authorities cited). The employment is not limited to the exact moment when the workman reaches the place where he begins his work or to the moment when he ceases that work. It necessarily includes a reasonable amount of time and space before and after ceasing actual employment, having in mind all the circumstances connected with the accident. Boyd on Workmen's Comp. § 486. Whether an employee in going to or from the place of his employment is in the line of his employment will depend largely on the particular facts and circumstances of each case. There must necessarily be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn has been held to be usually one of fact. Elliott on Workmen's Comp. Acts (7th Ed.) 41. The area of an employee's duty is much more readily ascertained in some cases than in others. Where the premises are confined to a single building or plant or inclosure it is usually held that the accident occurring on the premises arises out of and in the course of the employment, but when the accident occurs on the right of way of a railroad, and the right of way extends for miles with the main track line and for a considerable distance on the switch tracks or in the yards, it is much more difficult to decide. In the recent case of Schweiss v. Industrial Com., 292 Ill. 90, 126 N. E. 566, this court had occasion to review numerous authorities bearing on this question, and the cases there cited will illustrate how different courts have viewed this question. We will not attempt here to refer to those cases in detail, but simply cite the opinion which shows the bearing that such cases have on the question here involved. Some additional authorities, however, may help to throw light on the question.

An accident happened to a workman employed in one of the departments of the employer's oil works when he was going to his work on a path on the employer's premises provided for the use of the workmen, although at the time of the accident the nearest building belonging to the works was 80 yards away and his own working place was 300 yards distant. It was found that the accident arose out of and in the course of the employment. Nicol v. Young's Paraffin Oil Co., 52 S. L. 354.

An accident to a miner was held to arise out of and in the course of his employment where, while proceeding above the ground to his work, he fell and broke his leg on the rails belonging to the employer

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leading to the doorway of a horizontal passage by which the mine was entered, at a spot some 13 feet from the doorway. Mackenzie v. Coltness Iron Co., 6 Sess. Cas. (5th Series) Scot. Court of Session, 8.

Where a miner at the end of his day's work changed his clothes, and, still carrying a miner's lamp, started towards the bottom of the shaft with the intention of ascending to the top, and about 200 feet from the room where he had been at work and about half a mile from the bottom of the shaft one of his eyes was put out by coming in contact with a piece of slate hanging from the roof, it was held that the accident arose out of and in the course of his employment. Sedlock v. Carr Coal Co., 98 Kan. 680, 159 Pac. 9, L. R. A. 1917B, 372.

An employee who was injured while going down in an elevator in the building of his employer after the whistle blew to cease work was held to be injured in the course of his employment. Nelson v. Ætna Life Ins. Co., 12 N. & C. C. A. 660, note.

A stationary engineer, after the whistle had sounded for quitting work for the day, jumped over a pile of lumber to make a short cut out of the factory and fell, breaking his ankle. It was held that the injury arose out of the employment. Bennett v. Russell & Sons Co., 12 N. & C. C. A. 659, note.

A laborer at work in a field was stopped by a threatened storm, and while going to his home across his employer's land to avoid the storm he stepped on a plank and sustained an injury. It was held that the accident arose out of and in the course of his employment. Taylor v. Jones, 1 B. W. C. C. 3.

This court held in Stephens Engineering Co. v. Industrial Com., 290 Ill. 88, 124 N. E. 869, that an injury to an employee caused by a fall from a fire escape which he attempted to descend for the purpose of reporting to the timekeeper at the close of his day's work arose out of and in the course of his employment, where it was customary for the workmen to use the fire escape as a means of descent and such use was known to the employer, although there was another way of leaving the place of work which the evidence tended to show would be safer than the fire escape.

The great weight of authority appears to be to the effect that if the injured employee was on the premises of the employer in going from his work, leaving within a reasonable time, and following the customary or permitted route off the premises, the accident would be held to arise out of the employment. Boyd on Workmen's Comp. § 486. The leaving of the premises where one is employed is so closely connected with his employment as to render it a necessary incident thereto. It was stated in Terlecki v. Strauss, 85 N. J. Law, 454, on page 455, 89 Atl. 1023, 1024:

"It is a necessary implication of the contract that the workman shall come to his work and shall leave with reasonable speed when the work is over."

The fact that the employee in leaving the premises was following the usual and customary route is ordinarily considered of weight in deciding that the accident has taken place in the course of the employment. Bradbury on Workmen's Comp. (3d. Ed.) 473–477; Harper on Workmen's Comp. § 36. Beyond question, an employee will generally be considered as being within the course of employment when he is going to or from his place of work while on the premises of the employer, if he is following the customary or permitted route in going to and from his work. It has been said that an employee must not choose a needlessly dangerous path to and from his work, but that it is not necessary for him to use the path or place provided by his master; that is, it is enough that it is customarily used for these purposes by the workmen and that its

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use is not specifically forbidden. Gane v. Norton Hill Colliery Co., 2 B. W. C. C. 42; McKee v. Great Northern Railway Co., 1 B. W. C. C. 165; Barnes v. Nunnery Coal Co., 4 B. W. C. C. 43; 25 Harvard Law Review, 411, and cases cited.

As in this proceeding the accident happened before the employee reached the train of the defendant in error railway company, the question whether he was permitted to ride free has no controlling force on the question whether the accident arose out of and in the course of employment. In view of all the circumstances in the case, by the great weight of authority as well as by sound reasoning, we think the conclusion follows that this accident arose out of and in the course of Miller's employment.

The judgment of the circuit court will be reversed, and the award of the Industrial Commission will be confirmed.

Judgment reversed.

PERRY COUNTY COAL CORPORATION v. INDUSTRIAL COMMISSION ET AL. (No. 13256.)

(Supreme Court of Illinois. June 16, 1920. Rehearing Denied Oct. 8, 1920.)

128 Northeastern Reporter, 333.

MASTER AND SERVANT — COMPENSATION FOR LOSS OF SIGHT HELD IMPROPERLY AWARDED TO EMPLOYEE WITH CONSTITUTIONAL DISEASE AFFECTING VISION.

A coal miner, whose injuries, when a small part of a rock flying from a sledge struck his eye, did not cause any defect in the vision of both eyes, which were defective on account of the presence of exudates behind lenses and pupils caused by syphilis, was not entitled to compensation under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

Error to Circuit Court, Perry County; George A. Crow, Judge.

Proceedings for compensation under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152) by Samuel Coils, Sr., the employee, opposed by the Perry County Coal Corporation, the employer. Compensation was awarded by the Industrial Commission, the award affirmed by the circuit court, and the employer brings error. Judgment reversed.

R. W. Ropiequet, of St. Louis, Mo., for plaintiff in error.

CARTWRIGHT, C. J. Samuel Coils, Sr., was employed by the Perry County Coal Corporation in its mine, and on September 26, 1918, while he was breaking coal with a sledge, a small particle of rock, flying from the sledge, struck his left eye and lodged there. Medical and surgical aid were furnished by the employer, and he applied for compensation, alleging a loss or injury to his sight from the accident. Upon a hearing the arbitrator found that he had sustained 50 per cent. loss of the sight of the eye, and made an award accordingly. On petition for review of the decision of the arbitrator the Industrial Commission confirmed the decision and award. On a writ of certiorari from the circuit court of Perry county the decision of the Industrial Commission was affirmed, and a writ of error was allowed by this court to bring the record here for review.

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There was no dispute concerning the facts. Coils went to a doctor, who found the particle of rock lodged in the outer coating of the eye, at the junction of the iris and the white of the eye. There was some inflammation of the eyelids, but none of the iris, and the particle of rock had not gone through the outer or sclerotic coat of the eye. Coils returned to his work on September 30, and worked at his regular employment continuously up to the time of the hearing, in March, 1919, with the exception of a few chance days, not exceeding four or five in all. On February 16, 1919, Coils went to a specialist in diseases of the eye, who upon examination found that his sight was defective; that there was a defect in the vision of both eyes, and the pupils did not react alike. The vitreous or jellylike substance in the posterior of the eyes, behind the lenses and pupils, was filled with floating foreign bodies, which the doctor called "exudates." Coils had suffered an injury to his right eye, for which he received compensation. The doctor testified that the lens and iris of each eye were normal, and the defect was due to the floating exudates or foreign bodies, which were not caused by and had no relation to the accident, for which compensation was claimed, that the accident was not such as to increase or aggravate the existing condition, and that the condition was due to a pre-existing disease of many years' standing. Coils testified that he did not know there was anything wrong with the vision of his left eye before the accident, but after the accident he could not see as good as he did before, and had to look closely at objects to see what they were. However that may be, the evidence was conclusive that the dimness of vision was not caused by the injury complained of.

Whether Coils had a pre-existing disease, and, if so, whether it affected his eyesight or not, the only evidence in the case was that his vision was not affected by the accident.

The finding of the arbitrator, confirmed by the commission and the circuit court was without foundation because the defective vision was not caused by the accident. Therefore the judgment of the circuit court is reversed.

Judgment reversed.

STANDARD CABINET CO. v. LANDGRAVE. (No. 10757.)

(Appellate Court of Indiana, Division No. 1. Oct. 7, 1920.)

128 Northeastern Reporter, 358.

1. MASTER AND SERVANT — COMPENSATION CANNOT BE AWARDED ON FINDING NOT DISCLOSING NOTICE OF INJURY.

A finding of the Industrial Commission, which fails to show employers' knowledge of employee's injury, or written notice, or excuse, as required by Workmen's Compensation Act, § 22, is insufficient to sustain an award.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT CANNOT, ON APPEAL, AVAIL HIMSELF OF RULE OF INDUSTRIAL BOARD, UNLESS PLEADED.

On employer's appeal, attacking an award under the Workmen's Compensation Act on the ground that the finding does not show notice

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of injury, appellee cannot avail himself of a rule of the Industrial Board making want of notice a defense to be pleaded; the record failing to show that rule was pleaded or introduced in evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

4. MASTER AND SERVANT — COMPENSATION CANNOT BE AWARDED, IN ABSENCE OF FINDING OF NOTICE OF INJURY, THOUGH SHOWN BY EVIDENCE.

An award cannot be sustained, in the absence of a finding of knowledge or notice of injury, as required by Workmen's Compensation Act, § 22, though the evidence shows knowledge of the injury, and excuse for failure to give formal written notice.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act by Philip D. Landgrave, employee, to recover compensation for personal injuries, opposed by the Standard Cabinet Company, employer. Petitioner was awarded compensation, and the employer appeals. Reversed and remanded.

Joseph W. Hutchinson, of Indianapolis, for appellant.

Charles R. Hughes and Turner, Merrell & Locke, of Indianapolis, for appellee.

BATMAN, J. On November 4, 1919, appellee filed with the Industrial Board an application for the adjustment of his claim for compensation, arising out of an accident which he alleges occurred on April 23, 1919, while he was in the employ of appellant. After a hearing and an award by a single member of the Industrial Board, appellant filed its application for review by the full board. On such review the full board made the following finding:

"And the full board, having heard the argument of defendant's counsel, having reviewed the evidence and being duly advised in the premises finds that on the 23d day of April, 1919, plaintiff was in the employment of the defendant at the average weekly wage of $30; that on said date plaintiff received a personal injury by an accident arising out of and in the course of his employment, as the result of which plaintiff was wholly disabled for work for a period of 20 weeks, and has such permanent impairment of his right leg, which together with the period of disability entitled him to 40 weeks compensation."

On this finding the board made an award in favor of appellee, which forms the basis of this appeal.

[1] Appellant contends among other things, that the facts found are not sufficient to sustain the award. This contention is based in part upon the fact that the finding does not show that appellant, or its agent or representative, had knowledge of the alleged injury, or that it had been given written notice thereof, or that any excuse existed for a failure to give such notice. At the time of the alleged injury, the following provision of the Workmen's Compensation Act, with reference to giving notice of an injury, was in force:

"Sec. 22. Every injured employee or his representative shall immediately upon the occurrence of an injury or as soon thereafter as practicable give or cause to be given to the employer written notice of the injury and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued, under the terms of this act, prior to the giving of such notice, unless it can be shown that the

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employer, his agent or representative had knowledge of the injury or death, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person, or for equally good reason; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the injury or death, unless reasonable excuse is made to the satisfaction of the Industrial Board for not giving such notice." Acts 1915, p. 397.

It thus appears that knowledge on the part of an employer of an injury to an employee, or written notice of such fact, within 30 days after the occurrence of the injury, was essential to a recovery of compensation, unless facts existed which excused the giving of such notice. The finding does not disclose the existence of any such fact, and hence must be held to be insufficient to sustain the award. Indian Creek Coal & Mining Co. v. Beach (Ind. App. 1920) 127 N. E. 850.

Appellee, in opposition to the conclusion we have reached with reference to the effect of such omission in the findings, contends that only five facts need be found in order to sustain an award of compensation, and that knowledge, written notice, or excuse therefor, as stated above, is not one of them, citing the case of Munice Foundry & Machine Co. v. Thompson (1919) 123 N. E. 196. While the case to which our attention is called does not name the fact we are now considering as one of the essential elements to be found in order to sustain an award, still the section of the statute quoted above clearly makes it such, and we must so hold.

[2, 3] Appellee next asserts that such fact is a matter of defense, and, under the rules of the Industrial Board should have been pleaded, if relied upon. If any such rule of the Industrial Board so provides, appellee cannot avail himself thereof in this action, as the record fails to show that any such rule was pleaded or introduced in evidence, and this court cannot take judicial knowledge thereof. Hagenback v. Leppert (Ind. App. 1917) 117 N. E. 531; Zeitlow v. Smock (1917) 65 Ind. App. 643, 117 N. E. 665.

[4] Appellee finally contends that the evidence shows that appellant had sufficient knowledge of appellee's alleged injury, and that a reasonable excuse existed for the latter's failure to give the former written notice thereof. If it be admitted that this is true, such fact would not aid appellee, in the absence of a finding to that effect, as the award must be sustained, if at all, by the facts found.

For the reasons stated, we hold that the facts found are insufficient to sustain the award, and the same is therefore reversed, and this cause is remanded to the Industrial Board for further proceedings.

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INDIANA WINDOW GLASS CO. v. MAUCK. (No. 10824.)

(Appellate Court of Indiana, Division No. 2. Oct. 13, 1920.)

128 Northeastern Reporter, 451.

MASTER AND SERVANT — COMPENSATION CLAIMANT SHOVELING COAL AT PRICE PER TON HELD NOT "INDEPENDENT CONTRACTOR."

One hired at price per ton to unload coal from railroad cars by shoveling it out of the car to the bin, tools being furnished by employer, is not an "independent contractor" within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.)

Appeal from State Industrial Board.

Proceedings under the Workmen's Compensation Act by Wyatt M. Mauck for compensation for injuries, opposed by the Indiana Window Glass Company, the employer. From an award by the Industrial Board, the employer appeals. Affirmed.

Turner, Merrell & Locke, of Indianapolis, for appellant.

W. A. Cullop, of Vincennes, for appellee.

NICHOLS, J. This action was by appellee against appellant before the Industrial Board praying compensation for injuries suffered by appellee while unloading coal from railroad cars to appellant's producing bin by shoveling it out of the car to the bin. Appellant furnished appellee the tools to work with and paid appellee a price per ton for his services.

The question presented is as to whether appellee was an employee or an independent contractor. The substantial facts being undisputed, the case falls within the rule announced in the case of Muncie Foundry & Machine Co. v. Thompson, 123 N. E. 196. See, also, Cinofsky v. Industrial Commission, 290 Ill. 521, 125 N. E. 286.

Upon the authority of Muncie Foundry & Machine Co. v. Thompson, supra, the judgment is affirmed.

MITCHELL v. MYSTIC COAL CO. (No. 33310.)

(Supreme Court of Iowa. Oct. 19, 1920.)

179 Northwestern Reporter, 428.

1. MASTER AND SERVANT — EMPLOYER REJECTING COMPENSATION ACT PRIMA FACIE LIABLE FOR INJURIES.

Under Workmen's Compensation Act. Code Supp. 1913, § 2477-M (c), subd. 4, it being shown in an action for injury to an employee against the employer, who has rejected the act, that the injury arose out of, and in the course of, his employment, there is a presumption, constituting a prima facie case, that the injury was proximately caused by the employer's negligence.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

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9. MASTER AND SERVANT—INSTRUCTION HELD TO NULLIFY THE STATUTORY PRESUMPTION AGAINST EMPLOYER REJECTING COMPENSATION ACT.

Requested instruction in action against employer, who has rejected the Workmen's Compensation Act, that the jury has no right to find defendant guilty of negligence unless there is evidence to support it, nullifies the provision of the act creating a presumption of negligence against such an employer, and is properly refused.

(For other cases, see Master and Servant, Dec. Dig. § 410.)

10. MASTER AND SERVANT—FINDING THAT EMPLOYER REJECTING COMPENSATION ACT HAS NOT REBUTTED PRESUMPTION SUFFICIENT.

It is enough to find that employer, who has rejected the Workmen's Compensation Act, sued for injury to employee, has not negatived or rebutted the statutory presumption of negligence.

(For other cases, see Master and Servant, Dec. Dig. § 410½, New, vol. 7A Key-No. Series.)

Appeal from District Court, Appanoose County; C. W. Vermilion, Judge.

Action at law to recover damages occasioned by the death of Willard White while in the service of the defendant coal company. Trial to a jury. Verdict and judgment for the plaintiff, and defendant appeals. Affirmed.

Howell, Elgin & Howell, of Centerville, for appellant.

John Clarkson, of Albia, and H. E. Valentine, of Centerville, for appellee.

WEAVER, C. J. On April 11, 1918, the defendant company was engaged in operating a coal mine in Appanoose county, Iowa, and in carrying on the work of said mine it employed the services of the plaintiff's intestate, Willard White. On the day named, White, in obedience to the appellant's directions, was engaged, with others, in cleaning out dirt and rubbish which had collected in one of the mine entries through which coal was being removed, and while so at work a large rock from or near the junction of the side wall and roof of the entry fell upon him, killing him instantly. Prior to this accident the company had given notice, as provided by law, of its rejection of the terms of the Employee's Compensation Act (Acts 35th Gen. Assem. c. 147).

The plaintiff, as administratrix of the estate of the deceased, brings this action at law to recover the damages occasioned by his death.

The defendant answers by denial of the allegations of the petition, and pleads affirmatively the death of White was the result of the dangers and perils naturally incident to the work in which he was employed, and not in any degree to neglect or want of due care on its part. The answer also pleads affirmatively that the injury and death of deceased were due to his own negligence.

There was a jury trial, and verdict and judgment in plaintiff's favor for $3,500. Defendant appeals.

[1] I. Counsel for appellant first deny the sufficiency of the evidence to justify a recovery of damages, asserting that "there is not a scintilla of competent evidence to support the verdict." But the zeal of counsel leads them to overlook or forget that the record shows without dispute the employment of deceased in the company's mine, and his "personal injury sustained arising out of and in the course of his employ-

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ment," and that our statute expressly provides that under such circumstances " it shall be presumed that the injury to the employee was the direct result and growing of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence." Code Supp. of 1913, § 2477m.

Under this statute, to sustain her right to a recovery, plaintiff was not required to allege or prove specific acts or omissions of a negligent character by the appellant. See, on this point, Mitchell v. Swanwood Coal Co., 182 Iowa, 1001, 166 N. W. 391, where the subject is fully discussed. We there said: "When the servant has established the employment, and that the injury arose out of and in the course of his employment, a prima facie case of negligence is made against the master." In the case before us such prima facie case was made. The facts on which it rests are undisputed. Whether that showing, and the presumption arising therefrom, were successfully rebutted by the defense was a question of fact for the consideration of the jury.

Appellant sought to meet the case so made by testimony tending to show due care in daily inspection and in other precautions to make the entry a reasonably safe place to work; but it clearly does not present a case which enables the court to say, as a matter of law, that the burden which the statute casts upon the employer in such case has been successfully sustained. Counsel on both sides have taken much pains to explain the practical working of coal mines in the Appanoose field, and the methods followed in making and maintaining entries through which miners pass to and from their work and in which tracks are laid for the removal of coal. It is unnecessary to extend this opinion for a minute recitation of the facts. It is enough here to say that, as the coal is removed, entries or roadways several feet in width are preserved by building on each side a wall of so called "gob" or waste matter extending from the mine floor to the roof or cap rock which overlays the stratum of coal. The removal of the coal is followed by some degree of settling of the roof, which finally comes to rest upon the side walls of gob. To give head-room, and permit the operation of the cars on which the coal is carried away from the face, the height of the entry is increased by removing a stratum of clay which covers the floor or by taking down the cap rock or some of it from the roof.

[2] At the place where White was killed the cap rock had been cut or arched out, leaving a ledge or projection of such rock extending from the side of the entry a short distance into the upper part of the entry and resting on the side wall. How far this rock constituting the ledge extended into or beyond the gob wall of the entry was not known and was not open to visual inspection, but there was testimony from which the jury could find that, if the rock was broken so near the projection into the entry as to create danger of its falling or slipping out, the danger could be discovered by proper sounding and the peril removed by taking the rock down.

Indeed, it would seem hardly to require expert or technical knowledge of mining to suggest to men of ordinary prudence that a ledge of rock not more than a foot in thickness extending across the gob wall into an open space, and subjected to the tremendous pressure of countless tons of superimposed rock and earth material, would quite certainly break in due time (if not already broken), and the ledge fall into the entry.

There was testimony also tending to show that the break in this instance had taken place at a point only a few inches from the face of the wall and was not one of recent origin. In short, the circumstances were such that even admitting the truth of the company's testimony as to fre-

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quent inspections of the place and of care displayed to make the place reasonably safe, it still remained a question for the jury whether, had that duty been properly attended to, the danger would not have been discovered, and the defect remedied before this accident occurred. Mitchell v. Mining Co., 181 Iowa, 600, 165 N. W. 108.

The verdict for plaintiff cannot, therefore, be set aside as being without support in the evidence.

[3] II. Appellant next insists that a new trial should have been granted because of the misconduct of appellee's counsel in his argument to the jury. We regret to say that the trial was quite evidently marked with an excess of zeal and degree of heat on part of the respective counsel which have no proper place in a court of justice.

The court appears, however, to have made commendable effort to suppress these exhibitions, and to caution the jury against being influenced by anything except relevant facts considered with reference to the rules of law laid down in the instructions.

Altogether, we are impressed with the view that the trial court did not err in refusing a new trial on this ground. It is not to be denied that appellee's counsel did indulge in improper statements and insinuations, but extenuates his offense by asserting that appellant's counsel himself did not play the role of the inoffensive lamb, but assumed an attitude "furious, violent, impetuous, forcible, mighty, as a vehement wind, a vehement torrent, a vehement fire and heat," and by such conduct provoked and invited the retorts and declaration of which he complains. That there were bushwhacking attacks and counter attacks by counsel which deserve condemnation and rebuke must be conceded; but they were by no means confined to one side of the controversy, and, in view of the fairly successful efforts of the court to hold an even rein on the contestants and to protect the jury from being misled, we are not justified in ordering a new trial. Moreover, we must assume that the jury was made up of men of fair average intelligence, and that the froth and foam of these wordy battles, however entertaining to the audience in the back seats, made no serious impression upon the minds of the triers of fact, performing their sworn duty in passing upon the evidence.

[4] III. It appears that the wife and child of the deceased were present in court at the trial, and that counsel for the administratrix, in addressing the jury, referred to the widow and orphan more or less frequently, and said they were the persons who would receive the benefit of a recovery of damages. This also is relied upon as an abuse of counsel's privilege and an unfair appeal to the sympathies and prejudices of the jury. To sustain this assignment of error would be an undue restriction of the oratorical privileges of the advocate. Dowdell v. Wilcox, 64 Iowa, 721, 21 N. W. 147; Wissler v. Atlantic, 123 Iowa, 16, 98 N. W. 131; Brusseau v. Brick, 133 Iowa, 248, 110 N. W. 577; Geiger v. Payne, 102 Iowa, 593, 69 N. W. 554, 71 N. W. 571; George v. Swafford, 75 Iowa, 496, 39 N. W. 804; State v. Burns, 119 Iowa, 670, 94 N. W. 238; State v. Drake, 128 Iowa, 541, 105 N. W. 54.

[5] The control of arguments of counsel rests largely in the discretion of the trial court, and we do not interfere where that discretion is not abused.

[6] IV. The court instructed the jury that the appellant was not an insurer of the safety of its employees, but was charged with the duty of exercising reasonable and ordinary care to furnish deceased a safe place to work, unless the place was rendered unsafe in the prosecution of the work which deceased, with others, was then doing. Counsel say this was erroneous because deceased was not simply a "pick miner," but a "day man, inspector, remover of loose rock. and assistant pit boss." It is true deceased was, for the time being, a "day man"; that is, an employee who

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was paid day wages, and not a miner paid a price per ton for coal produced. But it is not shown that at the time of his injury he was a pit boss or assistant boss, or was other than an ordinary servant or employee doing a variety of work according as he might be ordered or directed by his foreman or boss. He had spent much time as a mule driver in the entries. On the day of his death he was sent with others to shovel out and remove the dirt or mud which had gathered along the side of the car track, and thus facilitate the drainage of the entry. There is no evidence that he was under any duty or obligation to care for the safety of the entry, other than the ordinary duty of the day man to use ordinary care to keep his eyes open, and, if he discovered loose rock or other defect or danger, to take necessary measures to correct it. There is nothing whatever to show or to sustain a finding that he was in any sense a vice principal or representative of the employer, or was charged with the performance of the magisterial duty to maintain the entries in a reasonably safe condition for the employees having proper occasion to use them. There was, therefore, no error in giving either the eighth or ninth paragraphs of the court's charge to the jury. Whatever may have been his duty when engaged in other lines of employment, it is obvious that when he was ordered to work as an ordinary laborer he was entitled to the same protection which was due to his fellow employees in such service.

[7, 8] V. Of the instructions requested by the defendant, it is sufficient to say that, in so far as they state correct propositions of law having any application to the case, they are fairly covered by, or embodied in, the charge given by the court on its own motion. The refusal of plaintiff's request that the court should warn the jury against "indulging in sympathy for the widow or child," and as a correlative to such admonition charge the jury "to refrain from entertaining prejudice against the defendant simply because he was and is a coal operator," was not erroneous. So far as appears from anything in the record, the court could rightly assume that the jurors were fair-minded men, needing no kindergarten instructions to insure an honest effort on their part to find a verdict upon the evidence and the evidence alone.

[9, 10] VI. The eighteenth request for instructions is that the jury has "no right to find that defendant was guilty of negligence in any respect in regard to the maintenance of the entry, unless there is evidence to support such finding." The request was properly refused. The force and effect of the proposition is to repeal the statute which makes the occurrence of injury to the employee arising out of, and in the course of, his employment, presumptive evidence that the employer was negligent, and that such negligence was the proximate cause of the injury, and the burden is on the employer to rebut such presumption. Hence, to sustain a recovery of damages, the jury need not find affirmatively that defendant was guilty of some specific negligent act or omission, but it is enough if, in view of all the evidence, the jury finds that defendant has failed to negative or rebut the statutory presumption.

VII. Other errors assigned upon instruction given and requests for instructions refused and upon rulings in matters of evidence are entirely too numerous to justify us in extending this opinion for their discussion in detail. The record is one of unusual volume, and prepared with slight reference to our rules, but we have examined it at length with care and find no reversible error. So far as the exceptions taken raise questions pertinent to the issues tried, they are governed and controlled by the conclusions we have announced in the foregoing paragraphs of this opinion. Of other points made, it may be said they reflect the erroneous view which pervades much of appellant's argument, that plaintiff, in addition to proof that the injury to deceased arose out of and in the course of his employment, must also prove that defendant was guilty of negligence

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with respect to some specific act or omission inconsistent with due care for the safety of its employees, a propsition which we have repeatedly pointed out is without merit in this case, since the enactment of the statute Code Supp. of 1913, § 2477m, which places the burden of negativing or rebutting the presumption of liability on the employer.

[11] VIII. Appellant's final contention is "that in any event the damages assumed are grossely excessive."

At the date of his death White was about 36 years old. His expectancy of life was 30.32 years. He had been married about 14 years, and was survived by his widow and a minor child. He was a man of sober and industrious habits. His earnings were about $5 per day. He had expended $800 to $1,000 for furniture, and paid cosiderable sums for medical and surgical services rendered his family, and at the time of his death had $350 in bank and in hand. He was an experienced miner, and so far as appears was in good health, with reasonable prospect of living out his expectancy. The jury assessed the damages to his estate at $3,500.

Assuming, as we must, upon the record, that the plaintiff was entitled to recover damages in some reasonable amount, the award made by the jury does not appear to be unreasonable or extravagant; or, to say the least, is not so manifestly excessive as to indicate that the jury was influenced or swayed by passion or prejudice. That a young married man of good and industrious habits, with an earning capacity of $1,500 per year, and having a life expectancy of 30 years or more, may reasonably be expected to accumulate an estate of the present worth of $3,500, is an estimate which hardly justifies counsel's fiery denuciation as an "unmitigated outrage." We find in it nothing which justifies us in interfering with the verdict.

In closing this discussion, it may be said it is true the statute to which references has been made places the defendant at considerable disadvantage as compared with the position it would occupy if all the common-law rules applicable to negligence cases of this class were still available to the employer. But having deliberately, and of its own choice, refused to accede to the terms of the Workmen's Compensation Act, and elected to submit to the alternative liability imposed upon employers taking that course, it has no ground of just complaint if, when suit is brought, it finds difficulty in avoiding the statutory restrictions which limit its defense.

We find no good reason for setting aside the verdict or ordering a new trial. The judgment below is affirmed.

Ladd, Stevens, and Arthur, JJ., concur.

REID et al. v. AUTOMATIC ELECTRIC WASHER CO., Inc., et al. (No. 33376.)

(Supreme Court of Iowa. October 4, 1920.)

179 Northwestern Reporter 323.

1. MASTER AND SERVANT — COMPENSATION COMMISSIONER'S LEGAL CONCLUSIONS REVIEWABLE.

Legal conclusions of the compensation commissioner may be reviewed.

(For other cases, see Master and Servant, Dec. Dig. § 447[6].)

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2. MASTER AND SERVANT — COMPENSATION COMMISSIONER'S UNWARRANTED FINDINGS NOT CONCLUSIVE.

Where there is no sufficient competent evidence in the record to warrant the compensation commissioner in finding servant was not engaged in putting down factory windows when killed, the finding is not conclusive under Acts 37th Gen. Assem. c. 270, § 17.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — PRESUMABLE THAT SERVANT WAS PERFORMING DUTY WHEN INJURED.

The presumption is that deceased servant was in the performance of his duty to close factory windows when killed by collapse of the part of the building he was in, caused by a tornado.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

4. MASTER AND SERVANT — EVIDENCE HELD TO SHOW INJURY IN EMPLOYMENT WITHIN COMPENSATOIN ACT.

In proceedings for compensation for death of factory foreman crushed by collapse of his part of the building in a wind storm, evidence *held* sufficient to show that the servant was in that part of the building, pursuant to his duty to close windows, and so was killed in employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

6. MASTER AND SERVANT — COMPENSATION COMMISSIONER'S FAILURE TO CONSIDER AFFIDAVIT OF ABSENT WITNESS HELD ERROR.

In proceedings for compensation for death of a factory foreman killed in collapse of the building during a windstorm, affidavit, of a fellow employee, in the army at the time of trial, that the deceased servant was attempting to close windows, a part of his duty, at the time of the accident, should have been considered and given weight as evidence in connection with the other circumstances, and the industrial board and compensation commissioner erred in not considering it.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

7. MASTER AND SERVANT — INJURY BY COLLAPSE OF FACTORY DURING WINDSTORM HELD ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT, NOT ACT OF GOD.

A fatal injury to a factory foreman crushed when walls of the building collapsed on account of a high wind as he was attempting to close windows, a part of his duty, *held* to have arisen out of and in the course of his employment, and not to have been caused by an act of God.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Jasper District Court, Jasper County; Chas. A. Dewey, Judge.

This is a proceeding under the Iowa Workmen's Compensation Statute (Acts 37th Gen. Assem. c. 270), by dependents, to recover for the death of a workman from an injury alleged to have arisen out of and in the course of his employment by defendants. The claim was disallowed by the arbitration committee, before which the evidence was taken. The evidence was all certified, and was properly before the commissioner, the distirct court, and is before us. On review before the in-

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dustrial commissioner, the conclusion of the arbitration committee was sustained. From this ruling, on appeal to the district court, there was a finding for defendants, confirming the decision of the commissioner, and the claimant's appeal was dismissed on the merits, and judgment rendered against them for costs. The claimants plaintiff, appeal. Reversed and remanded.

O. P. Meyers, of Newton, for appellants.

Stipp, Perry, Bannister & Starzinger, of Des Moines, for appellees.

PRESTON, J. No question is made but that claimants were dependents, and the committee found that deceased, George M. Reid, was contributing $20 per month to their support. Deceased, an unmarried man, and claimants, constituted one family. Two of claimants are his parents. Deceased was in the employ of defendant washer company, and was one of its foremen. The factory was a block long east and west, with various partitions—an exit at the west, and another to the east, through the office. The west part of it was two stories high, and the east part four stories. Deceased worked in the southwest corner of the second floor of the four-story part, with windows near him. He was injured May 21, 1918. and died a few hours afterwards. He was injured by debris from the higher part of the building crashing through to where deceased was, caused by a windstorm about 5 o'clock in the afternoon of that date. The factory was partly destroyed. The regular quitting hour was 6 p. m. There are stairs from one floor to another. The president of defendant factory testifies:

"Foremen were all instructed, especially when weather was threatening, to see that all windows within their jurisdiction were closed when they quit work. At the time of his death, Reid was foreman in his department. His duties as foreman, as regards closing windows when the gong rang, were the same as foremen in all departments, that upon leaving work for the day all windows of that particular department must be closed. We sound a gong at regular hours for commencing and closing work, electric factory horns and signals, operated automatically, by a master clock, and for an emergency, and dismissing men at odd hours. We have an extension of this system into the office, in the nature of a push button. Pressure on this push button blows the horns. On this particular day, after watching the storm approach some five minutes—it was probably going to be severe—I concluded that the men should be dismissed from the building, which was done by pushing this button and sounding the alarm all over the building. I operated the horn when the accident occurred, in a series of short, quick blasts, intended as a danger signal, that something was wrong. I wished the men to leave their places of work and hunt places of safety. It was not like the sound at regular quitting hour, when there was no unusual occurrence. He (deceased) also did some work in the northwest corner of the same room and floor, and he would naturally be obliged to close, or see that all windows in his jurisdiction were closed, which would include both southwest and northwest corners. The instructions were to close the windows, because we didn't know how serious a storm was coming up. I tried to arouse the men and women, and get them out quick. They had not been instructed as to any particular whistle that indicated to them that they must leave the building; the crushing in of south wall caused his death. It was over in a short time after gong sounded."

Some of the witnesses refer to the sounding of the gong or horn as a whistle—that it takes the place of a whistle. This sounding of gong can mean only one of two things, either the commencing or stopping of

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work. The foremen in every other department did close their windows at this time, as testified by the president. The president testified further:

"In watching the storm, it was five minutes before I thought there was any danger, or was much scared."

A witness testified:

"He censured himself because he had not blowed it sooner."

It is shown that the usual way for the men to leave the factory, when quitting, was in the west part of the factory, through a stairway in the west room of the entire factory, a room beginning some 50 feet west of the four-story part; that the men went west to that room and stairway to get out when the gong was sounded; all went west. The four-story part of the building was swept off and went over and fell and crashed on second story part, and down through. A witness testifies that as he went west to get out, he met some men going east, near west room of factory. Would not swear it was deceased; were all in a hurry. The father of deceased, who had worked in the factory a few days before the date in question, testifies:

"I was working on the third floor of the defendant's factory. A workman said to me, 'there is an awful looking cloud out there.' I opened a window and looked out, and thought the cloud was high, and would go over us, closed the window, and started back to work, when the gong sounded a warning of closing. The rest started to leave the room and passed me. I looked out the south window and began to see boards and other debris flying in the air. I landed on the second floor and had to go past the bench where George worked, but he wasn't there. Just as I approached the stairs leading to the first floor I met him coming back on the run. Where I met him was west of the part that was crushed in. I passed him, I would say, 30 feet—I had got beyond where the crash came. When it came, I stopped, knowing it useless to go farther. The instant I stopped, I commenced calling, and started back, realizing he might be caught in that crash. I saw the limbs of a man, projecting from under the debris; the rest of the body was covered. I commenced uncovering, and saw it was my son. I was working in east part on third floor. When I heard the gong, I went to stair leading from the third to second floor; and then went west, on the second floor, right past the bench where my son, George, worked, and kept on going west; and met him right near and little this side of the stairs leading from the second floor to the first; in west part of factory. This was approximately about 60 feet west of bench where he worked; he was then going east, and I was gonig west to get out. I was on the run—was walking fast. I met nobody else. Several others were just ahead of me, but all were going west, toward the exit. The gong is used the same as a whistle in a factory. It was a violent storm. Would have been extreemly bad if it had been closer to the ground. Several fatcories and residences were damaged. My son was the only one killed, and Mr. Newquist was the only one severely injured, as I recollect. Defendant's factory was damaged the greatest."

This witness testified further on cross-examination by defendants, and without objection, as follows:

"Mr. Newquist was injured the same time as my son. His position in factory was timekeeper.

"Q. Do you know what he (Newquist) was doing at the time of the accident? A. Yes.

"Q. State what he was doing. A. He was going over from his office to the factory, and he started to leave (help) by son to close some of the windows, and the crash came and caught both of them."

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On redirect examination of witness by claimants, this appears:

"Q. You were asked in regard to where Mr. Newquist was at the time of this storm, and what he was doing, and so on. Can you state more in detail about Newquist, as to what he had done, or said to your son and what your son was doing? A. This I can state from the statement I have from him.

"Q. I would not refer to that. State a little more in detail. You spoke of him a while ago. A. Newquist told me he was in the act of—

"Mr. Parmenter (for defendants): We object to the statement of what he was told, as hearsay evidence as to what Newquist said. He, perhaps, will be available as a witness.

"Mr. Meyers (for claimants): You went into it.

"Court: Objection overruled.

"Mr. Parmenter: Ruling of court objected to.

"A. (continued). Mr. Newquist said that George was in the act of closing the windows, and he started to help him when the crash came, and that was the last that he knew. He was unconscious."

On examination by the chairman of the committee, witness testified further, without objection:

"Mr. Newquist was employed in defendant's factory as timekeeper; he was going back through the factory, and saw George in the act of closing the windows; he was injured pretty badly; think his nose was broken; did not think he would recover for some hours.

Redirect examination (by claimants):

"Mr. Newquist is now at Camp Pike. He was drafted in the military service. I wrote him in regard to this matter, and he sent me this affidavit. [Affidavit is marked "Exhibit B."] This statement I referred to before. My son belonged to Sunday school."

Exhibit B, the affidavit just referred to, was offered in evidence and the following objection and record appears:

"Mr. Parmenter: Defendants object thereto because it is not the best testimony; that it purports to be an affidavit of a witness for whom the law has provided a way that he can be reached. It would be decidedly unfair to this defense not to give them an opportunity to cross-examine.

"Chairman: Why could not the deposition be had?

"Mr. Meyers: Well, he didn't know, hardly, where he would be. We knew he was at Camp Pike just a few days ago. It has practically all been given through his own questions.

"Chairman: Exhibit B, offered by claimants, may go in. It is understood that a voucher of that kind cannot be taken with as much value as a deposition, and can only be taken for what it is worth.

"Mr. Parmenter: Ruling of the court excepted by defense."

Exhibit B is as follows:

"State of Arkansas. County of Pulaski,

"I, Edward J. Newquist, having been duly sworn, in the case wherein L. D. Reid is plaintiff, and ——— is defendant. testify the following state of facts:

"On the 21st of May, 1918, I was in the employ of the Automatic Electric Washer Company, of Newton, Iowa, in the capacity of timekeeper, and had been in their employ for several months. About 5 o'clock of the above date I was in the office of said company when the storm approached, and I started to walk back through the factory. I met George Reid, who went to close a window, and I started to help him, but before I reached him the crash came, catching both of us. I was un-

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conscious for some time. I remember that George had passed beyond the part that was afterwards wrecked by the storm, but came back to close the windows; a duty which his position required him to perform, and so doing, lost his life. Signed and sworn to, October 26, 1918," etc.

Some of the witnesses refer to the storm as a windstorm, others as a violent storm, and others as a tornado. Such is the substance of the testimony, so far as it relates to the matters presented, which are whether it was shown that deceased was, at the time he was injured, engaged in the act of putting down the windows, which was a part of his duty under his employment, and whether his injury arose out of employment, and whether his injury was brought about by an act of God, rather than by the employment. The arbitration committee, in finding for the defendant, held that the injury suffered by deceased did not arise out of his employment, and was not a personal injury, within the meaning of the Iowa compensation laws, for the reason that it was brought about by an act of God, rather than by the empliyment. This position was sustained by the decision of the commissioner. The order and finding of the commissioner states, in part:

"Review is instituted by dependent parents upon the ground that the facts in evidence do not support the finding of the arbitration committee. George Reid was at work on second floor of his employer's plant when the alarm was sounded calling workmen to seek safety from the approaching storm. His father testified that as he was approaching the stairs leading to first floor, he met his son coming back on the run; that is to say, running away from the stairway through which workmen were seeking to escape. Claimants contend that he was returning for the purpose of closing windows in south side of building. Defendant suggests the theory that, finding the stairway, commonly used, in a congested condition from a rush of workmen, he turned back to seek exit at another stairway to first floor. There is no tangible support for the contention of claimant apart from the affidavit of Edward J. Newquist. * * *

Affidavits are admitted in evidence in compensation hearings for the purpose of corroboration, but, standing alone, are not assumed to be available for the establishment of vital issues.

"The record does not justify the assumption that the purpose of closing windows was in the mind of George Reid when he was caught in the collapsing building. It is incumbent upon the claimant in all compensation cases to establish by preponderance of evidence vital issues involved. However plausible conjecture may be, it is not sufficient basis for an award. The question uppermost in this consideration is: Did the death of George Reid arise out of and in course of his employment? The record does not establish this essential basis of compensation, either in fact or in law. If it were assumed that this workman was at the time of his fatal injury bent upon the purpose of closing the windows as claimed, this fact is not established, and if it were established there would yet be wanting elements of compensable relationship deemed essential in compensation jurisdiction generally."

[1] The commissioer in his finding then proceeds to refer to the case of Griffith v. Cole Bros., 183 Iowa, 415, 165 N. W. 577, L. R. A. 1918F, 923, which he considered, to a considerable extent as analogous to the case at bar, and held that the arbitration committee did not err in finding that dependents of deceased were not entitled to compensation, for the reason that his accidental death was brought about by an act of God, rather than by the employment. It may be remarked in passing that this case is referred to in note to Wiggins v. Board, 54 Mont. 335, 170 Pac. 9, L. R. A. 1918F, 932, at page 937, Ann. Cas. 1918E, 1164, it is thought the decision is placed upon the wrong ground. On appeal to the district

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court, a hearing was had upon the transcript, certified by the commissioner, and exhibits and only matters so transcripted were considered. The district court dismissed the appeal, as before stated. The first question is whether it was shown, either by hersay evidence, not objected to, or by affidavit of Newquist, or both, that deceased was, at the time of his injury, engaged in the act of putting down the windows, which was a part of his employment, or a part of his duties under his employment. It seems to be conceded, inferentially at least, by counsel for appellees, and by the commissioner, that if it had been proven that deceased was putting down the windows, compensation would be due, unless, as counsel for appellees contend, and the commissioner held, the injury was caused by the act of God. It is contended by appellees that the affidavit was inadmissible to prove that deceased was putting down the windows at the time he was injured. They argue that the rule ought not to be established in the hearing of compensation cases that affidavits are admissible, and that it would be a farce to try such cases in that manner, and they urge that the bars should not be thrown down, and frauds encouraged by decision that these cases may be so tried. Doubtless the same argument was made before the committee and the commissioner considered and held, as a matter of law, that the affidavit could not be considered, and it is equally apparent that no consideration was given by either to the hearsay evidence, or to the affidavit. If they were laboring under a misapprehension as to law, and for that reason did not consider the evidence, and if either, or both, who seem to have taken that view. Hearsay evidence on that point went in without objection, and the affidavit was admitted over objection. But it is plain that both the committee and the commissioner may be considered, and establish the fact, then it becomes question of law for us. The record as to both matters is before us, and if they may, under the circumstances, be considered, then there is no dispute in the evidence on the point as to what deceased was doing, and it becomes our duty to enter such decree as will enforce the legal rights of the parties, as disclosed by the facts appearing in the record. Legal conclusions of commissioner may be reviewed. Griffith v. Cole Bros., 183 Iowa, 415, 422, 165 N. W. 577, L. R. A. 1918F, 923; In re Annie McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Dietzen Co. v. Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; Bradley v. Board, 283 Ill. 468, 119 N. E. 615; Holbrook v. Hotel Co., 200 Mich. 597, 166 N. W. 876.

[2] If this evidence, undisputed as it is, may be considered, and it disallowed and not considered by the commissioner, under a mistake of of law, then there was no sufficient competent evidence in the record to warrant the commissioner in finding that deceased was not engaged in putting down the factory windows, and in such a case his findings would not be conclusive, under section 17, chapter 270, Acts 37th G. A.

[3, 4] I. Appellees suggest the theory that deceased turned back to seek exit at the east, or at another stairway to the first floor, and that his going east is compatible with that theory. Some of the cases hold that there may be a recovery when a party is going to or from his work, or the place of the performance of his duty. Appellee contends there is no evidence that he was closing windows at the time of his injury, and the commissioner seems to have so held when he said that there is no tangible support, apart from the affidavit of Newquist, that deceased was returning for the purpose of closing windows in the south side of the building. But we think there is more to the evidence than this, even outside the hearsay statements and the affidavit. It seems to us that, considering all the circumstances and the proper inferences to be drawn therefrom, the other proof comes very near, if indeed it does not, establish the fact that deceased was in that act, and in the performance of his duty. It

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appears without dispute that the purpose in sounding the alarm was that the employees might escape to a place of safety; all others but deceased and Newquist got out of the factory safely, and were uninjured; deceased was near the west entrance, and doubtless could have escaped as well as the others, but he turned back. He was found buried under the debris near the place where he would naturally be in closing the windows. It was his duty to close them, and the presumption is, not that he was not in the performance of his duty, but rather that he was Sugar Co. v. Shraluka, 64 Ind. App. 545, 116 N. E. 330, 332. But conceding, for the purpose of the argument, that all these circumstances do not quite establish the fact, slight evidence would be sufficient, if undisputed, to connect up the other circumstances. We think the statements of the father, though hearsay, admitted as they were, and the affidavit, clearly make the connection, and establish the fact. Taking up now, and considering first, the question as to the hearsay evidence, which, as said, went in without objection, and further it was brought out by the defendants themselves on cross-examination. We are considering now the verbal statements of the father of deceased, which the evidence shows were based upon the sworn statement of Newquist, in the affidavit. The statute, bearing upon the questions, both as to whether hearsay evidence and the affidavit may be considered as proof, provides:

"While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or inquiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and make such investigations and inquiries in the manner best suited to ascertain the substantial rights of the parties." Chapter 270, Acts 37th G. A.

In referring to another provision of the Compensation Act, we said in Rish v. Cement Co., 170 N. W. 532, 535, that the provisions of the act are highly remedial, and should be liberally construed without regard to technical rules, so as to carry out the purpose and object of the act. See, also, Sugar Co. v. Shraluka, supra. Same rule applies to the words "arising out of and in the course of his employment." Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N. E. 276.

In Mitchell v. Phillips Mining Co., 181 Iowa, 600, at page 607, 165 N. W. 108, we said, in speaking of some of the provisions of the act, that a radical change was made with reference to the matter of evidence, and that the purpose of the act was to provide a system whereby employers and employed might escape the evils of personal injury, litigation, etc. We think it was the purpose of the Legislature to relax somewhat the rules of evidence, and that the proceedings should be more informal than an ordinary proceeding at law. We have so held as to pleadings in probate. Charlton Nat. Bank v. Whicher, 163 Iowa, 571, 145 N. W. 299.

[5] We have a statute (section 4944h4, Suppl. Supp. 1915) that trial may be had upon affidavits in a contempt proceeding, where a party may be sent to jail. That statute also provides that it may be tried upon affidavits, or that either party may demand production, and oral examination of the witnesses. It is the general rule that a material fact at issue may be established by hearsay evidence, where the same is admitted without objection. Hege v. Tompkins (Ind. App.) 121 N. E. 677, 679. Same principle as to secondary evidence. Kenosha Stove Co. v. Shedd, 82 Iowa, 540, 544, 48 N. W. 933. In the Hege Case supra, the court said:

"The reasons for adopting the above rule in ordinary civil actions apply with even greater force in hearings before the Industrial Board. It is evidently the intent of the Workmen's Compensation Act that, by

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concise and plain summary proceedings, controversies arising under the same should be promptly adjusted by a simplified procedure, unhampered by the more technical forms and intervening steps which sometimes incumber and delay ordinary civil actions. * * * In harmony with the manifest intention of the act, this court has held that the Industrial Board is not bound by the rules of court procedure in civil actions. Hagenback v. Leppert, 117 N. E. 531."

[6] It was further said in the Hege Case that the board had a right to consider the hearsay evidence which was admitted without objection, and give it such probative force as it might believe it merited, under all the facts and circumstances. In Indemnity Co. v. Acc. Comm., 174 Cal. 290, 163 Pac. 60, it was held that a provision in the law permitting hearsay evidence of declarations of deceased employer relating to his injury is not unconstitutional. In Fogarty v. Biscuit Co., 221 N. Y. 20, 116 N. E. 346, hearsay evidence was considered. In the instant case, neither the board or commissioner gave any consideration to the hearsay evidence, since it is not referred to, and doubtless, under the same mistaken view of the law that they expressed in holding that the affidavit could not be considered. We think this language is applicable as applied to our statute before set out, which provides that in hearings before the arbitration committee or the commissioner they shall not "be bound by common law or statutory rules of evidence." As said, this evidence was first drawn out by defendants on cross-examination of claimant's witness, wherein witness had stated that deceased was in the act of putting down the windows when the storm struck. It is true, on redirect examination, defendants objected, but the evidence was already in. Defendants may not now complain, after having brought out the evidence themselves. Riordan v. Guggerty, 74 Iowa, 688, 39 N. W. 107. An affidavit is in a sense hearsay. Had the lower tribunals the right to consider the affidavit? We think so. It was so held in Moran v. Rodgers & Hagerty, 180 App. Div. 821, 168 N. Y. Supp. 410, where it was held that affidavits of parents in Ireland should be received to prove dependency under the New York Compensation Act, which is somewhat analogous to ours, in so far as it relaxes to some extent the rules of evidence. Some of the discussion in paragraph 1 of the opinion is applicable here, and we think, under the statute before quoted, the board and commissioner had the right to consider the affidavit. It may be that they were not compelled to do so, but as we have shown, it was not given any consideration, under a mistaken view of the law, and their finding was not based thereon. It is doubtless true that the board and commissioner have a discretion in the matter. Circumstances might be such that they might require that the person should be called as a witness, if that were practicable, or possibly require the party, under the statute, to appear for cross-examination in regard to the statements in the affidavit, or perhaps in a proper case, to disregard the affidavit. We do not mean to hold that these cases should be tried on affidavits. But here was an exceptional case. There was no other witness present with the deceased but Newquist. He was in the service, located in a distant state, and liable to be ordered to some other point at any time. So far as we know, he may have been in France, or on his way there, at the time the evidence was taken in this case. It would have been safer for defendants' employees, and a protection to their property from a windstorm, that the windows should be closed. It was the duty of deceased to close them. If it be true that he was in the performance of that duty, and in attempting to protect the lives of the other employees and defendants' property he lost his life, ought his dependents be deprived of the benefit of the evidence of Newquist, under the statute before quoted, simply because they were unable to produce him in person? We are clearly of the opinion

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that the affidavit should have been considered, and given weight in connection with the other circumstances, and that as a matter of law the board and commissioner erred in not considering it, and their finding that deceased was not so engaged is without support. Our first thought was to remand the case to the district court, with directions to send it back to the commissioner, that he might make a finding of facts, taking into consideration the evidence referred to in the prior paragraph, and this paragraph of the opinion. But the evidence is all before us, and as we think it is undisputed that deceased was putting down the windows at the time he was injured.

3. This brings us to the question whether deceased was killed by an act of God, and not by reason of an injury arising out of his employment. Appellees cite and rely upon Griffith v. Cole Bros., 183 Iowa, 415, 165 N. W. 577, L. R. A. 1918F, 923, Pace v. Appanoose County. 184 Iowa, 498, 168 N. W. 916, and the statute (section 2477m, 1913 Supp.). They consider the injury by the windstorm, in this case, as like an injury from lightning, while appellants argue that there is a difference, for that a bolt of lightning is but an instant flash, while the windstorm in this case was seen in the daytime for some time in advance, and could have been guarded against, and that the defendants did attempt to give warning, in order that deceased and others might escape to a place of safety. They say, further, that a storm of this kind could be seen a long distance and guarded against, and that the delay of the defendants in giving the alarm was negligence on the part of defendant factory, and renders the so-called act of God no defense. On this they cite Holmquist v. Gray Construction Co., 169 Iowa, 502, 151 N. W. 828; Shoe Co. v. Railway, 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45.

Appellees say further, that it is apparent that deceased, at work in defendant's factory, was under no greater hazard of being killed by the windstorm than any other citizen who was within the area of the storm; that he was not subjected to a causative danger peculiar to the work, and not common to the neighborhood; that at the time of his injury, while in defendant's factory, he was subject to no other or different hazard than that to which he would have been subject, had he been sitting in church within the area of that storm. This might be so, if there was a general destruction of all, or substantially all, the buildings, churches, etc., in the path of the storm. Deceased and Newquist were the only ones injured. The president of the factory company says his purpose was, and that he contemplated that by sounding the gong, those in the factory could escape therefrom, to a place of safety. There seems to have been more hazard for deceased at the place he was, and where his duty required him to be, than any other place. In 1 Corpus Juris, 1172, a variety of definitions, differing somewhat in their mode of expressions, are given. It is there said, also, that in a popular sense every occurrence is mediate- or immediately an act of God. One definition is that it is an act of nature, which implies entire exclusion of all human agency, that which is occasioned by the violence of nature, and at page 1174, it is said:

"The principle embodied in all of the definitions is that the act must be one occasioned exclusively by the violence of nature, and all human agency is to be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention, or negligence, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God."

Again:

"If divers causes concur in a loss, the act of God being one, but not the proximate cause it does not discharge from liability." Page 1176.

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The wind is doubtless, as many other things are, according to the law books, an act of God, but here human agencies participated. For instance, the defendants made it the duty of deceased, and gave him directions to be at this particular and more hazardous place, to put down the windows, when the alarm was given for the storm as it approached, when the men were to be dismissed. Deceased was not struck by the wind itself, as a bolt of lightning might strike him, but the falling wall, which was built by human agency, and not strong enough to withstand the wind—lack of diligence in giving the alarm, perhaps—and other things shown in the record. There is no question of negligence in this case. These circumstances are referred to, to show that deceased was not injured solely by the act of God, but to show that there was some causal relation between the injury and the employment, a part of his employment being to close the windows, or as said in Pace v. Appanoose County, 184 Iowa, 498, 168 N. W. 916:

"A causal connection between the conditions under which the work is required to be performed and the resulting injury"

—and as stated in the Griffith Case, that:

"The accident arose because of something I [deceased] was doing in the course of my employment, and because I was exposed by the nature of my employment [putting down the windows, as the storm approached after the alarm was sounded] to some particular danger [the falling wall at that place]."

In Fiarenzo v. Richards, 93 Conn. 581, 107 Atl. 564, it was held that the words "causal," "cause," and "proximate cause" are not employed in a technical sense, and that the act itself must be construed, and not decisions which may seem to limit the act. Under the circumstances here shown, surely deceased was subjected to "a causative danger peculiar to the work, and not common to the neighborhood."

In Ahern v. Spier, 93 Conn. 151, 105 Atl. 340, it was held that the fact that the employer was not exposed to greater danger than others in the same employment is immaterial. We have such winds or storms here. Houses and factories are built somewhat with reference thereto, and of sufficient strength to withstand all ordinary winds. Not so as to lightning. The evidence does not show that the storm was an unprecedented one. This storm was seen approaching for some time, prior to the accident, and some thought it was too high to do damage. It cannot always be known in advance how serious it may be. Sometimes they look dangerous, but nothing comes of it. But it was seen in time to take some precautions, and the president of defendant factory, after some delay which he regretted, gave the alarm. His purpose was, as he says, in order that the men might escape from the more dangerous position in the building, to a safer place—perhaps to a storm cave or cellar. At any rate, all did escape except deceased and Newquist. Suppose all the circumstances were the same as here—the directions and duty to close the windows, the alarm, the act of closing the windows, the falling wall, the injury—but instead of a windstorm there had been a fire, could there be any question about deceased being injured in the course of his employment, and that the injury arose out of the employment? It is clear to us there could be no question about it. Or suppose the wall in question had been blown down by an ordinary wind, what ought the test to be? That there would be liability under the same conditions if the wind had a velocity of 20 miles an hour, but no liability if the velocity was 60 miles an hour. Manifestly we may not lay down any definite rule. In Andrew v. Failsworth Industrial Society, 2 K. B. 32 (90 L. T. N. S. 611), an English case, where a bricklayer was killed by lightning, while working on a scaffold, some 23 feet from the ground, it was held that the height of his position subjected him to a peculiar danger, and

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risk from lightning, and that his death arose out of his employment. This case is referred to, in the Griffith Case, at page 431, as being a case where a workman on a high scaffolding was kept at work during a storm. In a like sense, in the instant case, deceased was kept at work during this storm, in that he was directed by the defendants, and it was a part of his duty, to put the windows down for the storm. See other lightning cases cited in the Griffith Case, 183 Iowa, at page 430, 165 N. W. at page 582 (L. R. A. 1918F, 923). It is there said that—

"It is not intended to hold that injuries from lightning can in no case be due to an industrial employment. It has been rightly said that they can be."

In the Pace Case, supra, we quoted from the McNicol Case as follows:

"It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The opinion also quotes from another case as follows:

"For an accident to arise out of and in the course of the employment, it must result from a risk reasonably incidental to the employment."

And we said in the Pace Case:

"What the law intends is to protect the employee against the risk or hazard taken in order to perform the master's task."

In the instant case, under all the circumstances shown, the danger was incidental to the character of the business, and the protection of the property and the lives of other employees; it was not independent of the relation of master and servant; deceased would not have been equally exposed to the same danger apart from the employment; the risk of hazard taken by deceased was in order to perform the master's task; there was causal connection between the conditions under which the work and the duties of deceased was required by defendant to be performed, and the resulting injury; the accident resulted from a risk reasonably incidental to the employment, and the duties of deceased thereunder.

[7] Applying the doctrine of the foregoing case to the instant case, we think the injury to deceased arose out of and in the course of his employment. Other cases are cited by appellants on this point, which they say are somewhat analogous; but, conceding they are not entirely so, we shall not stop to review them, but simply cite them: State ex rel. v. District Court, 138 Minn. 131, 164 N. W. 585, L. R. A. 1918C, 116 (freezing); State ex rel. v. District Court, 138 Minn. 260, 164 N. W. 917, L. R. A. 1918F, 921 (sun stroke); Kanscheit v. Garrett Laundry Co., 101 Neb. 702, 164 N. W. 708 (heatstroke); Young v. Furniture Co., 101 Neb. 696, 164 N. W. 712, L. R. A. 1918B, 1001 (heatstroke).

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Other cases where this question is discussed are: Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386, and note at pages 40 and 232. In this note at page 40 it is said:

"The determination of this question presents one most difficult problem in connection with the act. It has been said that each case must depend upon its own circumstances, and cannot be solved by reference to any formula or general principle."

Cases are cited to support the proposition. See, also, in connection with the Minnesota and Nebraska Cases above, L. R. A. 1917D, 114, note; Kunze v. Detroit Shade Tree Co., 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A, 252, where, employees traveling on the streets, it may be taken into account that they are subjected to the danger of being struck by street cars, automobiles, etc. The court said:

"Deceased received his injury during the hours of employment while actively engaged in performing work for his master, in accordance with duties imposed upon him by his employment." Mahowald v. Thompson, 134 Minn. 113, 158 N. W. 913, 159 N. W. 565.

Employee kept on the street in charge of his employer's team, subjecting him to the dangers of collisions with other teams, runaways, etc., the court said:

If an employer has "a teamster upon the streets of a large city, where he not only had to look out for his own safety, but also for that of his employer's team," negligence "necessarily accentuated the street risks to him above those to other occasional travelers, it suffices for the conclusion that this accident arose out of his employment. Although the risk from the accident in question may be said to be external to the employment, yet the employment caused a special degree of exposure to this risk."

See, also, In re Emma L. Brightman v. Terry, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321, where the death was from heart disease of a cook upon a boat, due to exertions in saving his personal effects when the vessel began to sink. Held that the death arose out of and in the course of his employment. The court said:

"It was an implied term of such service as this that the employee might use reasonable effort to this end in an exigency like that which arose. * * * It was in the course of his employment to live upon the lighter. Whatever it was reasonable for any one to do, leaving a sinking vessel, which was his temporary home, was within the scope of his employment. The standard to be applied * * * is that which the ordinary man, required to act in such an emergency, might do while actuated with a purpose to do his duty. * * * In the case at bar there may be found to be apparent to the rational mind a causal connection between the employment and the thing done by the employee at the time of the sinking of the lighter."

Other instances where it was held that the injury arose out of and in the course of the employment are: Pekin Cooperage v. Commission, 285 Ill. 31, 120 N. E. 530, where there was an assault by one employee upon another, the dispute concerning the employer's work. Rowland v. Wright, 1 K. B. 963, where a workman was bitten by a cat habitually kept on the premises. Barone v. Piano Co., 101 Misc. Rep. 669, 167 N. Y. Supp. 933, where an employee was bitten by a dog kept with the consent of the employer in part of the premises where employee's duties required him to go. In Nevich v. Railway, 90 N. J. Law, 228, 100 Atl. 234, L. R. A. 1917C, 847, employee assaulted while reclaiming his employer's property, by his direction. Baum v. Commission, 288 Ill. 516,

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123 N. E. 625, 6 A. L. R. 1242, where a workman voluntarily performs an act during an emergency which he has reason to believe is in the interest of his employer. In that case, the employee was fatally wounded by strikers, while he was trying to save his employer and other employees from injury. Mueller v. Board, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918F, 891, Ann. Cas. 1918E, 808, where a foreman, a half hour before time to begin work, went to another building to telephone for lumber, and was struck by an automobile. Held that ordering materials being an incidental duty, in discharging which the use of the telephone in a nearby building was as much in the course of his employment as if a telephone had been installed in the building under construction, and being used by the employee. In Fogarty v. Biscuit Co., 221 N. Y. 20, 116 N. E. 346, the court held that the position of night watch was exposed to the dangers of the bakery business. The court said:

"This court has given a more liberal construction to the compensation law, and held that: 'Where * * * an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriated in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed.' Matter of Larsen v. Paine Drug Co., 215 N. Y. 252, 256, 112 N. E. 725, 727. The principle has been extended to cover injuries to night watchmen. Matter of White v. Railway, 216 N. Y. 653, 110 N. E. 1051, affirmed in United States Supreme Court, March 6. 1917, N. Y. C. R. Co. v. White, 37 Sup. Ct. 247, 243 U. S. 188, 61 L. Ed. 667."

As a matter of law, on the undisputed evidence before us, we are of opinion that defendants are not relieved from the payment of compensation on the ground that deceased was injured and killed by the act of God. We are of opinion that he was injured in the course of, and that the injury arose out of his employment, and that claimants are entitled to compensation. Wages of deceased, and the amount he was contributing to claimants, and the other elements necessary as a basis for the allowance of compensation, were shown, or conceded before the board. but this feature of the case has not been argued, and we shall not stop to figure it out. The cause is reversed and remanded to the district court, with directions to allow compensation in accordance with this opinion, and the law and the evidence. Reversed and remanded.

Weaver, C. J., and Evans, J., concur.

SALINGER, J. (concurring specially). No distinction should be based on the fact that one injury was caused by the act of God in creating a windstorm, and that another was due to the act of God in creating lightning. Nor do I deem the naked fact that injury was caused by any act of God to be controlling. And nothing in Griffith v. Cole, militates against a recovery in the case before us. That case distinctly holds that death from being struck by lightning may be compensable. The test is not whether the injury was caused by an act of God but is whether the one injured was by his employment specially endangered by the act of God, be it lightning or windstorm. This decedent was more exposed to such injury than mankind generally. If an approaching storm seemed threatening, it was his duty to close windows. That might keep him in the path of the storm after his fellow employees had left the building and gotten out of the path of the storm. I base my concurrence on the nature of the employment being one that forced the employee to be specially subject to the danger from certain acts of God.

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HOLLINGSWORTH v. BERRY ET AL. (No. 22925.)

(Supreme Court of Kansas. Oct. 9, 1920.)

192 Pacific Reporter, 763.

(Syllabus by the Court.)

MASTER AND SERVANT—OIL AND GAS WELL HELD NOT A "MINE" WITHIN COMPENSATION ACT.

An employer of less than five workmen, who has not affirmatively elected to accept the provisions of the Workmen's Compensation Act, is not brought within its operation by reason of the fact that he is engaged in drilling an oil or gas well. An oil or gas well is not a mine within the meaning of the provision extendng the effect of the act to mines irrespective of the number of workmen employed.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Mine.)

Appeal from District Court, Montgomery County.

Action by Ray Hollingsworth against George D. Berry and Herman H. Fisher, partners. From an order overruling their demurrer to the petition, defendants appeal. Affirmed.

Thos. E. Wagstaff and D. W. Stewart, both of Independence, for appellants.

Chas. D. Welch, of Coffeyville, for appellee.

MASON, J. On October 25, 1919, George D. Berry and Herman H. Fisher were engaged in the business of drilling oil and gas wells, and Ray Hollingsworth was in their employ as tool dresser. While they were drilling a well Hollingsworth received an injury arising out of and in the course of such employment. He brought an action against the firm upon their common-law liability, alleging that his injury was due to their negligence. The defendants demurred to the petition upon the ground that it showed that they were subject to the provisions of the Workmen's Compensation Act (Gen. St. 1915, §§ 5896–5942), and that therefore the plaintiff's remedy was confined thereto. This appeal is taken from an order overruling the demurrer.

The petition sets out that defendants did not employ as many as five workmen, and it is not suggested that they had affirmatively elected to come within the terms of the Compensation Act. They consequently were subject to liability under the common law for any injury to the plaintiff resulting from the negligence alleged, unless they were brought within the operation of the statute by virtue of its provision that it applies to mines irrespective of the number of employees. Gen. Stat. 1915, § 5902. In other words the ruling of the district court is correct, unless an oil and gas well in the process of being drilled is to be regarded as a mine within the meaning of that provision.

Oil and gas, and for that matter water, are of course minerals in the broader sense of the word, but their extraction from the earth is not ordinarily spoken of as mining. In a number of cases it has been held that the word "mine" as used in a statute does not include an oil or gas well, there being no express provision to that effect, a matter, however, which obviously might be affected by the subject or context. J. M. Guffey Petroleum Co. v. Murrel, 127 La. 466, 53 South. 705; Kreps v. Brady,

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37 Okl. 754, 133 Pac. 216, 47 L. R. A. (N. S.) 106; Barton v. Wichita River Oil Co. (Tex. Civ. App.) 187 S. W. 1043. If such a meaning is to be given to it here it must be by virtue of the following portion of the section of the act giving definitions of terms therein used, which are to control "unless the context otherwise requires:"

" 'Mine' means any opening in the earth for the purpose of extracting any minerals, and all underground workings, slopes, shafts, galleries, and tunnels, and other ways, cuts and openings connected therewith, including those in the course of being opened, sunk or driven; and includes all the appurtenant structures at or about the openings of the mine, and any adjoining adjacent work place where the material from a mine is prepared for use or shipment." Gen. Stat. 1915, § 5903, subd. (c); Laws 1917, c. 226, § 2, subd. (c).

An oil or gas well, being an opening in the earth for the purpose of extracting minerals, is literally and technically within this definiton. The language, however, does not suggest a purpose to depart from the ordinary meaning of the word, except by making it include all connections and appurtenances. If it should be assumed that the sentence quoted, standing alone, would warrant regarding an oil and gas well as a mine for the purpose of this act, we think that effect must be denied it by reason of further provisions, one of which reads as follows:

"This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain." Gen. Stat. 1915, § 5900; Laws 1917, c. 226, § 1.

It will be noted that 12 classes of plants or occupations are enumerated, employment on, in or about which is necessary in order to render the statute applicable. The third of these is described by the word "mine," and it is only to this class that the statute is made applicable without an affirmative election by the employer, where less than five workmen are employed. The seventh class is designated by the phrase "engineering work," which is thus defined:

" 'Engineering work' means any work in the construction, alteration, extension, repair or demolition of a railway (as hereinbefore defined) bridge, jetty, dike, dam, reservoir, underground conduit, sewer, oil or gas well, oil tank, gas tank, water tower, or waterworks (including standpipes or mains) any caisson work or work in artifically compressed air, any work in dredging, pile driving, moving buildngs, moving safes, or in laying, repairing or removing, underground pipes and connections, the erection, installing, repairing, or removing of boilers, furnaces, engines and power machinery (including belting and other connections), and any work in grading or excavating where shoring is necessary or power machinery or blasting powder, dynamite or other high explosives is in use (excluding mining and quarrying)." Gen. Stat. 1915, § 5903; subd. (g); Laws 1917, c. 226, § 2, subd. (g).

From this it plainly appears that the effect the statute should have upon workmen employed in the construction of an oil or gas well engaged the attention of the Legislature, and from the fact that they were placed under the classification designated as "engineering work" and not elsewhere mentioned we think the inference is clearly to be drawn that they were not intended to be covered by the provision in relation to mines, even if the language employed would otherwise be open to that construction. This interpretation seems to us to be in harmony with the letter of the statute, and we think it also in accordance with its spirit. The mining industry was doubtless singled out from all others for special

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treatment for the reason that the workmen engaged therein are exposed to special and unusual dangers. Obviously the risks the Legislature had in mind in this connection were those peculiar to working in or about the kind of a mine that is suggested by the use of that word in common speech. One who is helping to drill an oil or gas well might be injured in substantially the same way as a miner, but the similarity would be incidental and not characteristic. The perils of well drilling would seem to resemble those of the other engineering work with which it is associated in the statutory enumeration, more closely than those that readily suggest themselves in connection with what is ordinarily spoken of as mining.

An objection is made to the conclusion we have reached on the ground that "construction" is not an appropriate word to apply to the drilling of a well, and therefore that process is not included within the statutory definition of engineering work." It is true that "construct" is not the term commonly used, or that naturally suggests itself in that connection. And this is true of its synonyms "form" and "make." But any one of these words is sufficiently descriptive of the process to make its use in that sense entirely permissible and free from the least ambiguity. The word "construct" was obviously used as a convenient term to be applied to the various structures work upon which was included within the definition.

In subdivision (e) of the section already referred to "electric work" is defined as that connected with the "construction, installation. *operation*, alteration, removal or repair" of electric apparatus. The plaintiff, from the premise that the omission of the italicized word from the definition of engineering wrok implies its intentional exclusion, argues that the drilling of an oil or gas well is not included because it constitutes the operation of the well rather than its construction. The drilling of such a well is of course an operation; it is an operation in the course of prospecting for oil or gas such as, for instance, meets a requirement to begin or prosecute operations of that character within a given time; but we think the drilling of an oil or gas well is more appropriately spoken of as its construction than as its operation. A distinction between drilling such a well and operating it is recognized in the statute which forbids doing either within 100 feet of a railroad. Gen. Stat. 1915, § 4978.

The plaintiff also invokes the statute enacted in 1903 (eight years before the first Kansas workmen's compensation legislation) under the title "An act to define the term 'mining,' and to further provide for the formation of mining companies and corporations," the first section of which reads as follows:

"The term 'mining,' as used in this and all other statutes, shall be held to mean the prospecting for and obtaining of all metallic and mineral substances, and in addition thereto, coal, clay, stone, petroleum, and natural gas, and any and all other valuable products formed or existing beneath the earth's surface." Gen. Stat. 1915, § 2326.

The specific purpose of this act was obviously to extend the provisions of the law authorizing the creation of corporations for the transaction of mining business so that it would unquestionably cover companies formed to prospect for and produce oil and gas. It does not expressly undertake to lay down a rule for the interpretation of statutes to be enacted in the future, but if such construction were to be given it, and its validity as so construed were conceded, we think the considerations already stated should still control.

The judgment is affirmed.

All the Justices concurring.

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McMILLAN v. ELLIS. (No. 22804.)

(Supreme Court of Kansas. October 9, 1920.)

192 Pacific Reporter 744.

(Syllabus by the Court.)

MASTER AND SERVANT — COMPENSATION ACT HELD APPLICABLE TO ELECTING BUILDING CONTRACTOR.

An employer of labor engaged in building work who employes less than five laborers in that work a part of the time, and more than that number the remainder of the time, and who, in writing filed in the office of the secretary of state, elects to come under the provisions of the Workmen's Compensation Law, is liable thereunder for injury to a workman in his employ.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from District Court, Sedgwick County.

Proceedings under the Workmen's Compensation Act by E. W. McMillan, opposed by H. I. Ellis. Judgment for plaintiff, and defendant appeals. Affirmed.

Sherman & Ladon, of Kansas City, Mo., and Moftzger & Cox, of Wichita, for appellant.

Matson & Stearns, of Witchita, for appellee.

MARSHALL, J. The defendant appeals from a judgment against him under the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216). The action was tried without a jury, and the court made special findings of fact as follows:

"(1) On the 18th day of March, 1919, E. W. McMillan, while in the employ of the defendant in Witchita, Sedgwick county, Kan., received a personal injury by accident arising out of and in the course of his employment, from the effect of which injury he died on or about the 20th day of March, 1919, leaving the plaintiff, his widow, as his sole dependent.

"(2) At the time of his death and at the time of his injury, E. W. McMillan was receiving from the defendant wages at the rate of $5 per day, and his average yearly earnings at that time were more than $1,300.

"(3) On the day of the injury and the day previous to the injury the defendant had in his employ more than five workmen, and the defendant did not have five workmen in his employ at any other time during the month immediately preceding the accident.

"(4) The defendant was at the time of the accident, and had been for several years before the accident, engaged in the contracting and building business in Witchita and elsewhere in the state of Kansas. During the summer months while the defendant was actively carrying on his business he had a large number of men in his employ. During the season of 1918 he had more than fifty men in his employ in Witchita, Sedgwick county, Kans., continuously for several months. During a short time in the winter the defendant was unable to carry on his business actively , and on that account suspended operations, and at times did not have any workmen employed, and at other times had a smaller number. At the time of the accident he was just beginning active operations for the season of 1919, and had just begun to employ his usual number of men for active operations during the building season.

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"(5) On the 5th day of April, 1913, the defendant filed in the office of the secretary of state at Topeka, Kan., a paper which read as follows:

" 'Wichita, Kan., Apr. 4. 1913.

" 'Mr. Charles Sessions, Sec. of State, Topeka, Kansas—Dear Sir: I am an employer of labor, doing business under the name of the H. I. Ellis Construction Company, general contractors, and this is to inform you that I elect under the law not to come under the "Workmen's Compensation Act" of 1911, as amended by the law of 1913.

" 'Please make whatever necessary records, if necessary, or if necessary, or, if you have blanks for this purpose, send same to me at once.

" 'Yours very truly,

" 'H. I. Ellis Const. Co.,

" 'HIE—AMR. Per H. I. Ellis, Pres. & Mgr.'

"(6) On May 29, 1918, the defendant filed in the office of the secretary of state a paper which reads as follows:

" 'KD—5147.

" 'State of Kansas, Sedgwick County—ss.

" 'Election of employer to come within the provisions of article 6, chapter 61, General Statutes of 1915, as amended by chapter 226, Session Laws of 1917. Rescindnig former election.

" 'To the Secretary of State:

" 'You are hereby notified that H. I. Ellis Construction Company hereby elects to come nuder the provision of article 6, chapter 61, General Statutes of 1915, being an act entitled "An act to provide compensation for workmen injured in certain hazardous industries," as amended by chapter 226, Session Laws of 1917; that said H. I. Ellis Construction Company is an employer of labor and is engaged in the business of general building contractor, city of Wichita, and in the county or counties of all counties in the state of Kansas.

" 'H. I. Ellis Const. Co.,

" 'By H. I. Ellis.

" 'Attest: F. E. Parr.

" 'Dated this 27th day of May, 1918.' "

On those findings the court made conclusions of law as follows:

"(1) As the defendant was during the season of 1918 for months continuously, as hereinbefore found, engaged in the building work with more than five workmen in his employ, both the defendant and the workman, E. W. McMillan, were under the Compensation Law of the state of Kansas, being chapter 218 of the Laws of 1911, entitled 'An Act to provide compensation for workmen injured in certain hazardous industries,' as amended by chapter 216 of the Laws of 1913 and chapter 226 of the Laws of 1917. The fact that the defendant had in the winter of 1918 and 1919 temporarily suspended active operations in his building work did not remove him and his business from the operation of the Workmen's Compensation Law, and when he began building work in the spring of 1919 he was, and has been since the building season 1918, under the Compensation Law, and during all of said time the said law was applicable to him and his employees.

"(2) The paper filed by the defendant in the office of the secretary of state on the 29th day of May, 1918, was and constitutes as a matter of law an election to come under the terms of the Compensation Law and operate his business under said law without regard to the number of workmen which he employed at any particular time.

"(3) The plaintiff is entitled to recover from the defendant by reason of the 'Workmen's Compensation Law' of the state of Kansas on account of the death of her husband the sum of $3,800, with interest thereon at the rate of 6 per cent. per annum from March 18, 1919, together with the cost of this action."

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But one proposition is argued, and that is that the defendant did not come within the terms of the Workmen's Compensation Act, neither by reason of the number of persons employed by him, nor by reason of of the election filed by him on May 29, 1918. The Workmen's Compensation Law then applied to building work, and provided that the act "shall only apply to employers by whom five or more workmen have been (employed) continuously for more than one month at the time of the accident: Provided, however, that employers having less than five workmen may elect to come within the provisions of this act in which case his employees shall be included herein, as hereinafter provided." Gen. Stat. 1915, § 5902. It is not necessary to examine farther than to ascertain whether the defendant had elected to come under the provisions of the act. By his communication to the secretary of state and by his filing that communication in the office of the secretary of state the defendant formally and regularly elected to come under the provision of the law and is conclusively bound by that election.

An ingenious argument is made that—

"The last provision of section 5902 with regard to employers having less than five workmen can have no application to this case, for the reason that the court found that the defendant when pursuing his business, and on the date of the accident, had more than five workmen in his employ, and that during the summer months while defendant was actively carrying on his business, and during the season of 1918, defendant had more than fifty men in his employ continuously for several months, and that during the winter defendant was unable to carry on business and suspended operations, and at times did not have any workmen employed, and at other times a small number."

This argument is not convincing and cannot be followed, for the reason that section 1 of chapter 226 of the Laws of 1917 provides that—

"Employers whose work, trade or business is not such as described and included in this section of this act, and employers commencing or renewing in this state any work, trade or business, may elect to come within the provisions of this act by filing with the secretary of state a written statement of election to accept thereunder, and such election shall be effective when so filed."

This statute was strictly complied with by the defendant; he elected to come under the Workmen's Compensation Act whether he had less than five employees or more than that number, and he cannot now be heard to say that the act did not apply to him.

The judgment is affirmed.

All the Justices concurring.

McLEAN'S CASE.

McLEAN v. AMERICAN RY. EXPRESS CO.

(Supreme Judicial Court of Maine. October 20, 1920.)

111 Atlantic Reporter 383.

MASTER AND SERVANT — LOSS OF PART OF FOOT HELD NOT "LOSS OF FOOT" WITHIN COMPENSATION ACT.

Where so much of an employee's foot as lay forward of the plane of the front surface of the tibia, or shin bone, was amputated, so that he lost the toes and instep, but not the heel, and so that with the aid of a

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specially constructed boot he was able to step on the heel, he did not sustain the "loss of a foot" within the Workmen's Compensation Law, § 16, prior to amendment by Pub. Laws 1919, c. 238, and was entitled to an award for loss of his toes.

(For other cases, see Master and Servant, Dec. Dig. § 385[14].)

(For other definitions, see Words and Phrases, First and Second Series, Loss of Limb.)

Appeal from Supreme Judicial Court, Cumberland County, at Law.

Proceeding by Allen C. McLean for compensation under the Workmen's Compensation Act, opposed by the American Railway Express Company, employer. Award for claimant, and employer appeals. Appeal sustained, and decree modified in acordance with opinion.

Argued before Cornish, C. J., and Spear, Hanson, Philbrook, and Morrill, JJ.

Harry E. Nixon, of Portland, for claimant.

Verrill, Hale, Booth & Ives and Leon V. Walker, all of Portland, for respondent.

CORNISH, C. J. On January 6, 1919, the claimant, an employee of the American Railway Express Company, sustained an injury to his right foot, in consequence of which so much of the foot as lay forward of the plane of the front surface of the tibia, or shin bone, was amputated. The Industrial Accident Commission decided that this constituted "the loss of a foot" under R. S. c. 50, § 16, and accordingly awarded the plaintiff, in addition to his medical bills, $132.50, the sum of $8.88, being one half of his average weekly wages, for a period of 125 weeks, beginning January 20, 1919.

It is admitted that the injury arose out of and in the course of employment and the only question to be decided by this court on appeal is whether the Commission erred as a matter of law in so construing the statute as to hold that the claimant had sustained the loss of a foot under section 16. Nor is there any controversy as to the extent of the injury and amputation. Dr. Twitchell, who performed the opearation, and the only sugical witness in the case, testified that the length of his foot was 9¾ inches, that 6 inches were removed, and 3¾ inches were left, including the calcaneum, or heel, and the portion next the heel up to the line of severance; that it was necessary to take off the head of the astragalus, or ankle bone, where the shin bone articulates with it, because otherwise he could not get flap enough to cover it; that the ankle joint retains its motion, and that the heel support is the same as before the accident. In other words, the claimant has lost the toes and instep, but not the heel, and walks upon what remains of the foot, with the aid of a specially constructed boot having a steel support running up the front of the tibia. It further appears that the claimant began work September 2, 1919, at a wage of $20.75 per week, which is greater than he was receiving at the time of the accident, and has been at work continuously since that time.

In determining the quesion whether the claimant has lost his foot, it must be remembered that the accident occurred in January, 1919, before the amendment (P. L. 1919, c. 238) was passed whereby this provision was added to section 16 of the original statute:

"In all cases of this class where the usefulness of a member or any physical function thereof is permanently impaired, the compensation shall bear such relation to the amount stated in the above schedule as the incapacity shall bear to the injuries named in this schedule and the commission shall determine the extent of the incapacity."

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This addition provided for cases of loss or impairment of use of a member where the member itself was not lost. Previous to this amendment the words "loss of a member" were construed to mean loss by severance and not by incapacity. Merchants' Case, 118 Me. 96, 106 Atl. 117. In other words, a distinction was drawn between loss and loss of use.

Applying this rule, which must apply to this case, and eliminating the question of use, the single problem remains whether the loss of two-thirds of a foot, as in this case, is the loss of a foot, whether in other words the part is equal to the whole. Anatomically speaking, the foot extends from the ankle joint to the end of the toes, and is divided into three parts, the tarsal bones or ankle, the metatarsal bones, or instep, and the phalanges, or toes. In the case at bar the metatarsal bones and phalanges were severed, while the ankle bone and the heel were left practically unimpaired. If the loss contemplated by the statute is not of the entire foot, then what fractional part shall be fixed by the court as equal to the whole? Shall it be a loss of one-third or one-half or two-thirds or four-fifths? Where shall the line be drawn? Such a construction would seem to be rather in the nature of judicial legislation than of judicial construction, and we think it more consonant with judicial interpretation to hold that, according to the common meaning of the language, the statutory words "the loss of a foot," mean the loss of an entire foot, and not a fractional part thereof.

Especially does this construction seem reasonable when we consider the fact that the Legislature seems to have had in mind this very question in many instances, and when it desired to make the loss of a part equivalent to the loss of the whole it expressly provided for it. Thus, after specifying the compensation for the loss of a thumb and for the loss of a thumb and for the loss of each finger at a given rate, and the loss of the first phalange of the thumb or of any finger as one-half of the amount for the whole, it added:

"The loss of more than one phalange shall be considered as a loss of the entire thumb or finger."

Again after specifying the amount for the loss of a toe, and of the first phalange of any toe, the Legislature expressly said:

"The loss of more than one phalange shall be considered as the loss of the entire toe."

In each of these instances it is indisputable that the words "thumb," "finger," and "toe," as used in the first clause, mean the entire thumb, finger, or toe and that when the intention was to make any part less than the whole equivalent to the whole, it was expressly so stated. If the claimant's contention is sound, then these special provisions were entirely unnecessary, becauase without them the loss of a substantial portion of a member is equivalent to the loss of the entire member.

Still again, "For the loss of an arm, or any part at or above the wrist," and "the loss of a leg, or any part at or above the ankle," are provisions carrying out the legislative intention with precision. But in the clause of section 16, now under consideration, there is no such modifying provision. It does not say, "For the loss of a foot or the parts in front of the heel," nor "the loss of the toes and instep shall be considered as the loss of the entire foot," but simply and baldly "for the loss of a foot, without any diminution or qualification whatever. This must mean the entire foot and nothing less. In fact in section 14 of the same chapter the equivalent of "the loss of both feet at or above the ankle or both hands at or above the wrist" is given as "the loss of one hand and and one foot," the point of severance not being stated. That point must impliedly be the same in both instances, and the severance must include the entire foot.

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Counsel for claimant calls our attention to a line of cases in other states, but upon examination these are found to have arisen under statutes giving compensation for loss of use, and therefore are not authorities in the case at bar.

Our conclusion therefore is that the decree should be modified, and the claimant should be awarded in addition to his medical expenses, $132.50, compensation for the loss of his toes at the rate of $8.88 per week for a period of 65 weeks from January 20, 1919.

Appeal sustained.

Decree to be modified in accordance with the opinion.

THORNE v. F. C. JOHNSON CO.

(Supreme Judicial Court of Maine. Oct. 25, 1920.)

111 Atlantic Reporter, 410.

MASTER AND SERVANT — NONASSENTING EMPLOYER WITHIN COMPENSATION ACT, LIABLE FOR NEGLIGENCE.

Where defendant was not an assenting employer, within the Workmen's Compensation Act, and regularly employed more than five men in the business in which plaintiff was employed, plaintiff was entitled to recover damages, on proving the negligence alleged, in action therefor.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

On Motion from Supreme Judicial Court, Cumberland County, at Law.

Action by Albert G. Thorne against the F. C. Johnson Company. Verdict for plaintiff, and defendant moves for a new trial. Motion overruled.

Argued before Cornish, C. J., and Spear, Hanson, Philbrook, and Morrill, JJ.

Hinckley & Hinckley, of Portland, for plaintiff.

Howard Davies and Joseph E. F. Connolly, both of Portland, for defendant.

PER CURIAM. This is an action to recover damages for personal injuries sustained by plaintiff while in the employment of defendant in its business of coal and wood dealer. The latter was not an assenting employer, within the meaning of the Workmen's Compensation Act (Rev. St. c. 50, §§ 1–48), and regularly employed more than five men in the same business in which plaintiff was employed. The only issue, therefore, was the alleged negligence of defendant.

It is the opinion of the court, after a careful examination of the evidence, that the jury were fully justified in returning a verdict for the plaintiff.

Motion overruled.

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KOZA'S CASE.

APPEAL OF AMERICAN MUT. LIABILITY INS. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Oct. 14, 1920.)

128 Northeastern Reporter, 400.

MASTER AND SERVANT—COMPENSATION CLAIMANT HELD NOT INJURED IN EMPLOYMENT WHEN MAKING REPAIRS.

A dyeing machine operator subjected to drip of water from ventilator pipe, who, without knowledge or permission of foreman, or express or implied authority of the employer, went to roof to repair ventilator, and was injured by falling through a hole onto a revolving fan, was not within the scope of his employment, and his injury did not arise out of it or in its course.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act (Laws 1911 c. 751. as amended by Laws 1912, c. 571) by George Koza, the employee, opposed by the Merrimack Manufacturing Company, the employer, and the American Mutual Liability Insurance Company, the insurer. Compensation was awarded by the Industrial Accident Board, the award confirmed by decree of the superior court, and the insurer appeals. Reversed and decree directed for insurer.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

Paul L. Keenan, of Boston, for claimant.

CARROLL, J. The employee operated two dyeing machines known as "jigs." In the dyeing room where he was employed there was a large amount of steam and at times water would drip upon him from the ventilator pipe. He complained to his foreman that the ventilators were not working properly and the foreman promised that they would be repaired. The employee testified that on the morning of November 4, 1919, because of a defect in the ventilator, "steam was coming down on him and condensing into water," and "water was dripping from above." Without the knowledge of the employer, he went from the dyeing room to the roof of the building for the purpose of repairing the ventilator; a few feet from the window by which he came to the roof, there was a hole through which he fell onto a revolving fan, and was severely injured.

It was no part of the employee's occupation to repair the ventilator. Before the day of his injury he had never attempted this work, and without the knowledge or permission of his foreman, and without any express or implied authority from his employer, although seeking to promote its interest, he engaged in an undertaking which was not within the scope of his employment, and could not be found to arise out of it, or in its course. The case is governed by Borin's Case, 227 Mass. 452, 116 N. E. 817, L. R. A. 1918A, 217; Bolden's Case, 235 Mass. 289, 126 N. E. 668; Rochford's Case, 234 Mass. 93, 124 N. E. 891.

The decree of the superior court is to be reversed and a decree is to be entered for the insurer.

So ordered.

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KROPF v. MICHIGAN BEAN CO. ET AL. (No. 64. JUNE TERM.)

(Supreme Court of Michigan. Sept. 30, 1920.)

179 Northwestern Reporter, 276.

MASTER AND SERVANT—EVIDENCE HELD TO SHOW ACCIDENTAL DROWNING IN COURSE OF EMPLOYMENT-WITHIN COMPENSATION ACT.

Evidence, in support of a claim under the Workmen's Compensation Act for the death of a night watchman, *held* to sustain the finding of the Industrial Accident Board that deceased accidentally fell into the river while engaged in his duties about his employer's warehouse and dock, and not while fishing for his own purposes.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to Industrial Accident Board.

Proceedings by Barbara Kropf, under the Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10), against the Michigan Bean Company and the Southern Surety Company. The Industrial Accident Board awarded compensation for the death of applicant's husband, and defendants bring certiorari. Award affirmed.

Argued before Moore. C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Clark C. Coulter, of Detroit, for appellants.

Burt D. Cady, of Port Huron, for appellee.

MOORE, C. J. The Michigan Bean Company, on March 17, 1919, had a warehouse and long dock, on the banks of the St. Clair river at Port Huron. Jacob Kropf had been employed by the Michigan Bean Company as a night watchman and janitor for about 3½ years prior to March 17, 1919. On March 17, 1919, the foreman for the company, upon coming to work about 6:30 a. m., found the lights about the plant still burning, and Jacob Kropf had disappeared. He had punched his watchman's clock at about 4:40 or 4:50 a. m., and had placed the clock in its usual place in the office of the Michigan Bean Company. April 30, 1919, Mr. Kropf's body was found in the river two miles below defendant's dock. A claim was made by plaintiff, and an award was made in her favor. This proceeding is certiorari to review that award.

It is conceded that if there is any liability the award should not be disturbed. The claim of the appellant is tersely stated in a brief by its counsel as follows:

"There is no evidence in the record which would warrant a finding that his death was in any manner due to an accidental personal injury received in the course of his employment; that there is no evidence in the record which would indicate an accidental personal injury arising out of his employment; that the manner in which he came to his death is a matter of conjecture only; that the facts which are proved upon the record are as consistent with the nonliability of the defendant under the Compensation Act as with the liability; that the only conclusion that can be legitimately drawn from the evidence is that the man was fishing at the time he fell into the river. * * *

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"The attention of this honorable court is invited to the fact that snagging herring is an active process, involving the jerking up through a school of herring of a line to which are attached a number of hooks; that a man to do this ordinarily would stand upon his feet, and would move rapidly. It is the defendants' theory that the deceased, at the time he fell into the river, had snagged some herring on his hooks, and, as is quite usual, doubting whether his pole was strong enough to lift the fish to the dock, reached over and seized the fishline below the end of the pole in his hand, for the purpose of lifting his catch to the dock. It is believed by the defendant that in this act he lost his balance and fell into the river, and it is submitted that this is a highly feasible explanation; certainly much more feasible than that the deceased went to the edge of the dock to empty a pail of dirt with a fishpole in his hand (the pail being later found sitting upright several feet from the edge of the dock); or that he went out on the dock to perform some unknown duty, carrying a fish pole in his hand for some unknown reason."

Counsel cite in support of their contention Ginsberg v. Adding Machine Co., 204 Mich. 130, 170 N. W. 15; Chaudier v. Lumber Co., 206 Mich. 433, 173 N. W. 198, 5 A. L. R. 1673, and other Michigan cases.

It may be well here to call attention to what is said in the return of the Industrial Accident Board. We quote part of it:

"The decedent's work as night watchman called him on duty at 7 p. m., and relieved him from duty at 5:30 a. m. His duties during this time were to clean up the office, warehouse, and elevator, keep up the fires in furnaces, and make the rounds of 10 or 12 watch stations once each hour, ringing up the hours on his watchman's clock with the keys placed at the respective stations.

"On the morning of March 17, 1919, he rang up his last station, as required, on the clock, between 4:40 and 4:50. From that time nothing was known of him until his body was found floating in St. Clair river, a considerable distance down the river from the dock of the Michigan Bean Company."

"On the night and morning of March 17, 1919, there was a very dense fog on the river, making the dock very wet and slippery and objects not discernible, even at a distance of 2 feet away.

"When the body of decedent was recovered on April 30, 1919, it was found his watch had stopped at 4:58 o'clock, about eight minutes after the last station was recorded on the watch clock. It was one of his last duties to turn off the lights on the dock and outside of the buildings. These were controlled by a switch located in the office of the D. & C. Boat Company, a few feet away from the edge of the dock, which lights were found to be on when the workmen arrived at the Michigan Bean Company on the morning of March 17, 1919. The habits of the decedent were exemplary, and he was painstaking and industrious in the discharge of his duty.

"To sustain their contention that the accident did not arise out of and in the course of the employment of the deceased, the respondents rely upon the theory that the decedent had left his employ, and was fishing off the dock when he met his death. It appears from the proofs that after the decedent was missed, his overcoat, undercoat, glasses, and several small herring, wrapped up in a newspaper, were found on a table in the office; that a pail which the decedent was accustomed to using about his work was found standing near the edge of the dock a short distance from one of the stations to which it was necessary for this decedent in the course of his employment to go. * * *

"The respondent was missed early on the morning of March 17. 1919. He was last seen while performing his duties upon the premises of the respondent. On April 30th following his body was taken from the

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river some distance below the respondent's premises. When the body was recovered a jointed bamboo fishpole was attached to the body; a line connected to the pole being wrapped around the decedent's arm. Some witnesses testify this pole is the previously mentioned pole which had been kept about the premises. There seems to have been no identification marks about this pole by which the witnesses would be able to distinguish it, other than a piece of bag string, which had been used to fasten it together at the joint, so that a section might not be lost in case the pole came apart. There is considerable testimony in the record to the effect that many jointed bamboo poles were sold and used in this vicinity of the same make and appearance as the pole in question, and that it was not unusual for such poles to be tied together at the joints for the purpose of preventing the loss of a section. The body, when recovered, had on overalls and smock of the deceased which he wore when about his work.

"The fish which were found wrapped up in a paper upon careful inspection by a number of witnesses showed that they had no wound upon them, as they would have had if they had been caught with a hook in the manner in which herring are caught. It appears by the testimony that herring are caught either in a seine or net, or by what is known as snagging. It appears by the proofs that if these fish had been caught by snagging, or with a hook as the respondents contend, they would have been wounded.

"It appears by the proofs that many of the witnesses saw a pail standing near the edge of the dock, and one witness connected with the respondent company claims to have seen fish scales in it. None of the other witnesses noticed the fish scales. The fish found upon the table had not been scaled. The decedent had frequently purchased fish from fishermen who fished about this dock and others. Although he had worked about this dock in the neighborhood of 3 years, and many of the witnesses had been well acquainted with him, and about the docks a great deal, none of them had ever seen him fish. There is testimony to the effect that he was afraid of the water. He disappeared very early on Monday morning. Testimony shows that he had conscientious scruples against working on Sunday, and that on Sunday nights he did all his work after 12 o'clock. His duties were that of a night watchman, and in addition it was his duty to keep up the fires, and do a considerable amount of janitor work. There were a number of stations upon the premises, and it was his duty to make rounds of each station and punch a clock every hour. One station was about 10 feet from the edge of the dock and in passing to and from this station it was necessary to be within 7 or 8 feet from the edge of the dock. There was an unusually dense fog upon the morning in question. Testimony shows that the fog was so dense that a lantern would be of little or no use, it being the custom of decedent to carry a lantern. The decedent had made his rounds and punched the clock between 4:40 and 4:50. The watch which he carried and which was recovered with his body had stopped at 4:58. The lights were found burning when employees reached the premises at about 6 o'clock. It was one of the last duties of the decedent to turn off these lights. To perform this duty he would pass near the edge of the dock. * * *

"It appears from the proofs that fishermen in this vicinity did not fish during a dense fog. It further appears that the decedent was a faithful and conscientious employee. The temperature upon the night in question, according to the witnesses, was about such as is usual at this season of the year. If a man were to indulge in fishing under these

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conditions, it would not seem that he would stay out in the cold and dampness, clad as decedent was, with his heavy clothing laying in the office.

"It would seem clear that the fish found in the office had not been caught by the decedent, and must have been purchased from some one, as the decedent was accustomed to purchase fish from others.

"It appears that the pail upon the dock was one which the decedent was in the custom of using to carry sweepings from the office for the purpose of throwing them into the river. From the time that decedent punched the clock in the course of his duties and the time that his watch appears to have stopped he must have fallen into the water almost immediately after punching the clock, as the watch probably would not stop instantly upon entering the water. The dock was slippery, and the darkness was extreme. It would not be unusual for the decedent in making his rounds to become confused and take a step or two out of his usual course; it would not be unusual for him to fall from a slippery dock or accidentally step into the water. It would be unusual for a man 51 years of age, who had worked about the same dock for 3 years and never indulged in fishing, to choose a cold, foggy, chilly, disagreeable morning to indulge himself in this pastime, especially without protecting himself with heavy clothing, which he had at hand.

"We therefore find that the applicant's decedent fell from the dock and was drowned while engaged in the performance of his duties as an employee of the respondent Michigan Bean Company, and that the accident arose out of and in the course of his employment."

The foreman of defendant company on cross-examination testified in part:

"Q. How long had Mr. Kropf been working for you? A. I couldn't just tell you, because I haven't had the records to fall back on, but about 2 years, I imagine.

"Q. You always found him an efficient employee? A. Mr. Kropf was one of the finest I ever knew; he was methodical and capable and kept things up in good shape.

"Q. Very painstaking? A. Yes; and I am sure that he would not diverge one step from the path of duty until his duties were performed.

"Q. You have always found him very careful in that respect? A. Yes, sir.

"Q. And he always followed instructions? A. Yes, sir.

"Q. You say there were some lights in the warehouse burning? A. On the warehouse.

"Q. That is on the outside? A. Yes, we kept our electric lights there.

"Q. It was his duty to turn those lights out? A. Yes, sir.

"Q. What were the hours he was supposed to report? What hours did he leave? A. Those hours varied.

"Q. He had regular hours? A. Yes. On Sunday night we gave him an hour so he could attend church services, if he desired; probably around 8:30 he would report.

"Q. What time was he supposed to quit? A. 5:30 in the morning."

The foreman of the Michigan Bean Company testified that he saw herring fish scales in the pail he saw on the dock. The fish that had been wrapped up by Mr. Kropf were taken to his house, and the testimony is that they had not been scaled, and that they had no wounds such as would have existed if they had been snagged.

The coroner, who assisted in removing the body from the water, testified in part:

"Q. Did you or did you not find that a fishing pole was with this body? A. I did.

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"Q. Was this fishing pole in any manner fastened to the body? A. No; the fishline was around his arm.

"Q. Which arm? A. If I remember right it was the right arm, and the pole was dragging from it.

"Q. The pole was attached to the fishline, and the fishline was around the deceased's right arm? A. Yes, sir."

Cross-examination by Mr. Cady:

"Q. Was there any hook on the line? A. Not that I remember of; if there had been a hook. I think I would have remembered it.

"Q. It was a small line around his arm? A. Around his arm.

"Q. Did you know whether there was more than one twist of the line? A. No; I think there was just one twist around the arm."

Much stress is put upon the testimony of Willard Smith, a young man about 15 years old, whose evidence tended to identify the fishpole as one he had used. His attention was called to the pole shortly before the trial, and he examined it. We quote:

"Q. Did you recognize that fishpole as the same fishpole which you had used and which had disappeared at the time of Mr. Kropf's disappearance? A. Yes, sir.

"Q. How did you recognize it as the same pole? A. I recognized where I had tied it together with bag twine.

"Q. That is, when you used this pole you had repaired it with bag twine? A. Yes, sir.

"Q. Is that the pole which Mr. Falk has in his hands? (Witness examined pole.) A. Yes, sir.

"Q. Is that the twine on there that you put on there yourself? A. It is.

"Q. And you are absolutely certain that is the same pole you had used? A. Yes, sir.

"Q. And that disappeared? A. Yes."

On the cross-examination he testified in part:

"Q. When did you see this pole last before March 17, 1919? A. About three or four weeks before.

"Q. What were you using it for? A. To catch fish.

"Q. What kind of fish? A. Herring.

"Q. How were you catching them? A. Hooking them.

"Q. Snagging them? A. Yes, sir.

"Q. How many hooks were on the line? A. There was four, I think.

"Q. Four grapples? A. Yes, sir.

"Q. How many hooks on each grapple? A. Three.

"Q. Was there a sinker on it? A. Yes; I think so.

"Q. Were there any grapples or hooks or sinkers on this line when you saw it over at Falk's rooms? A. No, sir. * * *

"Q. You used it twice; is that the times? A. Yes, sir. * * *

"Q. And one of those occasions was about four weeks before March 17th, and the other about three weeks before March 17th; is that correct? A. Yes, sir. * * *

"Q. Is there anything about this pole other than the string that makes you identify it as the pole that was down there? A. No."

There was much testimony that many poles were used along the dock which were jointed poles, the joints of which were connected with a string in a manner similar to that described by Willard Smith, and that some of these poles were lost in the river.

The testimony is very clear that a fishpole when last seen at defendant's dock hand attached to it a line, to which there was attached grapples, to each of which were attached hooks. It is equally clear that the line wound around the arm of deceased when he was found had neither grapples nor hooks.

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We have recited very little of the testimony. That portion recited in the award is to be found in the voluminous record. We have not referred, except as quoting from the award, to that relating to the cold March morning on the St. Clair river, and the fact that the deceased's thick clothing was left in the office, nor the fact that the fog was so dense as to be almost impenetrable, making the dock wet and slippery, and its outlines invisible. It has already appeared in what we have quoted that Mr. Kropf disappeared with some of his work undone, and, if any inference is to be drawn from the time when his watch stopped, he disappeared before quitting time had arrived.

In the case of Ginsberg v. Adding Machine Co., supra, we do not understand that any new rule of evidence was announced in the majority opinion. We quote from it:

"The burden of establishing a claim for compensation rests on those seeking the award. They are not required to establish their case by positive, direct evidence; in many cases that would be impossible; they may prove their case by circumstantial evidence, as other cases are established. The board is the trier of the facts, and weighs and measures the conflicting testimony, medical as well as lay. Deem v. Kalamazoo Paper Co., 189 Mich. 665; Perdew v. Nufer Cedar Co., 201 Mich. 520. It is the province of the board to draw the legitimate inferences from the established facts, and to weigh the probabilities from such established facts. Wilson v. Phœnix Furniture Co., 201 Mich. 531."

In that case five of the justices were of the opinion that the established facts did not warrant an inference that would establish claimant's case, while three of the justices were of the opinion that the inference might be fairly drawn from the record. The situation is Chaudier v. Lumber Co., supra, was practically the same.

In the instant case we think the conclusions of the Industrial Accident Board are justified by some of the established facts. See De Mann v. Engineering Co., 192 Mich. 594, 159 N. W. 380; Perdew v. Nufer Cedar Co., 201 Mich. 520, 167 N. W. 868; Wilson v. Furniture Co., 201 Mich. 531, 167 N. W. 839.

The award is affirmed, with costs to the complainant.

LEITZ v. LABADIE ICE CO. ET AL. (No. 14.)

(Supreme Court of Michigan. Sept. 30, 1920.)

179 Northwestern Reporter, 291.

1. MASTER AND SERVANT — TEST OF COMMON LABORER'S TOTAL DISABILITY WITHIN COMPENSATION LAW.

That one is not as a common laborer, able to do exactly the same particular kind of common labor he was doing when injured is not the test of total disability within the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 385[5].)

2. MASTER AND SERVANT — WORKMAN EARNING BETTER WAGES FOR "COMMON LABOR" AFTER AWARD HELD NOT TOTALLY DISABLED.

"Common labor" is of unskilled manual labor, and is an "employment" within Workmen's Compensation Law which makes no classification, so that, where one was doing work for an ice company as a com-

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mon laborer, attending a slide which required strength for lifting, when he suffered injuries causing total incapacity for that class of work, for which injury an award was made, after which he was employed by a manufacturer to operate a punching machine at higher wages, he was not then totally disabled so as to justify denial of the company's petition for relief from the award, though the leg injured was still so crippled that he was unable to do the work done when injured.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

(For other definitions, see Words and Phrases, First Series, Common Labor; First and Second Series, Employment.)

3. MASTER AND SERVANT—FINDINGS OF FACT BY INDUSTRIAL BOARD NOT REVIEWABLE.

The court will not review findings of fact by the State Industrial Accident Board beyond determining whether the record discloses any competent legal evidence, direct or inferential, to support facts necessarily found by the board as a basis for its conclusions of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Certiorari to Industrial Accident Board.

Proceedings under Workmen's Compensation Law by Carl Leitz, for compensation for injuries, opposed by the Labadie Ice Company, employer, and the Standard Accident Insurance Company, insurer. Petition by employer and insurer to be relieved from further weekly payments to employee under an order of the State Industrial Accident Board refused by the board, and employer and insurer bring certiorari. Order set aside, and case remanded for further review, with instructions.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird and Sharpe, JJ.

Keena Lightner, Oxtoby & Hanley, of Detroit, for appellants.
Thomas, Shields & Silsbee, of Lansing, for appellee.

STEERE, J. Defendants by writ of certiorari seek review and reversal of an order of the State Industrial Accident Board, refusing their petition to be relieved from further weekly payments to plaintiff under a previous order of said board.

The record discloses that plaintiff, Leitz, suffered an accidental injury on February 2, 1917, while in the defendant ice company's employ, and, having been, by approppriate proceedings under the Workmen's Compensation Law (Pub. Acts Ex. Sess. 1912, No. 10) adjudged then totally disabled, was awarded $6.78 per week. This was paid him from February 2, 1917, until December 19, 1919, at which time defendants asked release on the ground that his incapacity to earn wages had ceased, and he was in fact earning more money at manual labor than he received at the time of his accident.

When injured plaintiff was a young man about 20 years of age, working for the ice company as a common laborer at a wage of $3 per day of 10 hours. He had been in its employ 16 or 18 days, and before that time worked as a farm hand. When the accident occurred he was attending to an ice slide, or chute, switch, where they were filling a couple of icehouses, his duties being to attend to and switch the slide from time to time so it would carry the ice as it came up "first to one icehouse and then to another," work which he said any person of average intelligence could learn to do in an hour. The blocks of ice coming up the slide were 22 inches square and 10 inches thick, requiring, as he stated, a "fairly strong man" to handle the switch, which he lifted up with his hand as occasion required. While he was on the ice slide running the

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switch the slide broke, and let him fall about 15 feet. He fell somewhat angling, and ice fell upon him, injuring his left hip so severely that medical attendance was required. He was concededly laid up, and totally incapacitated from labor for some time. The award then made of one-half his weekly wages as continuing compensation for total incapacity was paid by defendants for approximately 150 weeks, when defendants asked relief on the ground that he was again able to earn full wages. He is not shown to have engaged in any employment for over 2 years after his injury, but in July, 1919, he entered the employ of an auto body company at Lansing, operating a punching machine at 42 cents an hour, and was at the time of taking testimony in this proceeding, February, 1920, receiving 47½ cents per hour. At this work he was seated, operating the press with a pedal, using his right foot, the left leg being yet crippled so that he could not depend on it, and had to use crutches, as he testified.

The entire finding of the Industrial Accident Board in denying its petition is as follows:

"(1) That the applicant is totally disabled in the employment in which he was engaged at the time of the accident.

"(2) That this total disability existed at the time the testimony was submitted, February 20, 1920, and has been continuous since the date of the accident.

"(3) That during the period of applicant's total disability he shall be compensated in accordance with the terms of the award entered July 7, 1917."

Following this finding, the board—

"ordered and adjudged that said petition should be, and the same is hereby, denied, and said applicant is entitled to receive an recover compensation at the rate of $6.78 per week from the date covered by the last payment, * * * to continue, as above provided, during the period of applicant's total disability; * * * that should applicant become but partially disabled at any time in the future on account of the accident, he shall be entitled to receive one-half the difference between the average weekly wage he was earning at the time of the accident and the average weekly wage he is able to earn thereafter, in accordance with the terms of the Workmen's Compenstion Act."

It will be noted that the findings are in their nature final conclusions of mixed law and fact upon the ultimate issue presented, and leave to conjecture upon what testimony in the record the order is based.

The sole question raised by defendants is whether under the undisputed testimony in this case plaintiff, who was again able to earn more at manual labor than when injured, was totally incapacitated for work in the class of employment at which he was engaged at the time of the accident. Their contention is that his employment was the ordinary work of a common laborer, in the particulars of which the law makes no distinction or classification. His testimony shows that prior to his employment by the ice company he was a farm hand, and at the time of his injury was employed at common labor, helping to put up ice. Defendants further point out that it likewise appears he was at the time of the hearing also engaged in work essentially that of a common laborer, able to earn, and earning, in such employment more money than at the time of his injury; that, as he testified, laborers around the body company plant did "most anything," some welding, soldering, cutting, and sometimes laboring men ran punch presses.

"Q. So that work which you are performing at the auto body company is operating a punch press? A. Yes, sir.

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"Q. You claim that the running of a punch press is not a laborer's work? A. I don't know as it is a laborer's work, most anybody can run it.

"Q. Most anybody can run a punch press that can run a slide? A. Yes.

"Q. It is more difficult than operating an ice slide? A. No."

As to the condition of plaintiff's leg, he testified that it was yet crippled, he could not put much weight upon it or walk without crutches, and was unable for any length of time to do work which required him to stand, saying, "It is the nerves that bother me," for which reasons he would not be able to work in operating a switch at an ice slide, as he was doing at the time of the accident.

Dr. Randall, who examined him shortly before the hearing, testified that he used an X-ray to examine plaintiff's left hip, and as far as that disclosed anything he found no deviation from normal; that his legs were of the same length, and the left measured with the right as in a normal person; but when he attempted to have plaintiff do different exercises with his left foot he was unable to stand on the left leg more than a second or so at a time without support; that he could extend and reflex the leg, but could not extend it outward, the function lacking in the leg being "adduction," and from the examination it was his opinion plaintiff could not do the kind of work he was engaged in at the time of the injury, as he described it; that from the history of the case and his examination at "the present t me" the leg was apparently making a fairly good recovery, saying, "The only thing he lacks is the forward extension of the leg."

[1, 2] On what theory the Accident Board arrived at a determination from this record that plaintiff was totally incapacitated to earn wages in the employment of a common laborer, which is the test under the undisputed testimony in this case, we are not advised. Plaintiff's own testimony shows that when injured he was working as a common laborer, and such was the nature of his employment when his petition was filed and passed upon by the board. That he was not as a common laborer able to do exactly the same particular kind of common labor he was doing when injured is not the test of total disability, as the board recognized and properly held in Miller v. Fair & Sons, 206 Mich. 360, 171 N. W. 380. In that case Miller was working in a foundry, mixing and wheeling sand, etc., when injured in his hand and right arm, on March 23, 1916. Compensation at one-half his average weekly wages was agreed upon between the parties, approved by the board, and paid until May 18, 1917. On his application that compensation be continued thereafter the board, on March 16, 1918, held he was entitled at that time to compensation from May 18, 1917, less amount he had earned during that period, saying in its decision that—

"Running an elevator is in the judgment of the board common labor. * * * It appears to the board that the hand of the applicant is in quite bad condition, and it is likely that the applicant will be either totally or partially disabled for some considerable time to come. * * * It cannot be said to a certainty that he will be totally disabled nor that he will be only partially disabled, and therefore the order of the board should provide for either condition."

In the opinion affirming the board's decision, prepared by Justice Ostrander, it is said in part:

"The labor he was performing, shoveling and wheeling a barrow, required the use of both hands. He can and does perform labor which does not require the use of the right hand and arm. * * * The award must stand unless, as claimant contends, one who is a common laborer, and is disabled while doing some particular labor requiring the use of

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both of his hands and arms, is totally disabled, if on account of an injury he cannot perform the same labor or labor which requires the use of both arms and hands, but can perform other common labor We are unable to make the required distinction, being of opinion that the work of one engaged in what is ordinarily described as common labor is an employment within the meaning of the act. The act does not classify persons employed at labor, but it does recognize that there are different kinds of employment. That act was intended to affect and apply to existing conditions, one of which, generally recognized, is that persons are employed as common laborers—that the employment of certain wage-earners is, and is known as, common labor. A definition of common labor, exclusive and inclusive, is not easily formulated, but the common understanding is, for the purposes of this decision, illustrated in the testimony of the claimant."

Miller there described the nature of his work when injured, as did plaintiff here. Whether he called it common labor or denied it was such, would not change its character. While, as suggested in that opinion, an exact definition of common labor, exclusive and inclusive, is not readily formulated, we think it may safely be said that, as generally used and understood, it signifies that kind of unskilled manual labor, with or without simple tools, which is commonly done by the masses of working people in lines of employment necessitating no special trade or previous training, before engaging in them, beyond what can be quickly learned and effectually performed by the laborer while employed at regular wage under direction of those in charge, as distinguished from that class of skilled and less common manual labor to perform which previous experience, apprenticeship, study, practice, or manual training in some special calling, handicraft, or trade is required. Plaintiff's employment as described by him did not fall within the latter class, either when he was injured or later. Affirming the reason of the board's ruling in the Miller Case this court held that, while recognizing there are different kinds of employment within its meaning, the act does not classify persons employed at labor and that what is ordinarily described or recognized as common labor is an employment. Had the board adhered to its previous ruling upon that proposition, which this court sustained, we fail to discover under the undisputed testimony in this case how the result shown in the order appealed from could be logically reached.

Counsel for plaintiff cite and rely on Foley v. Detroit United Ry., 190 Mich. 507, 157 N. W. 45, and Jameson v. Newhall Co., 200 Mich. 514, 166 N. W. 834, urging them as undistinguishable precedent in this case consistently followed by the board.

[3] As this court views the testimony in those cases, it carried the controversies into the field of permissible issues of fact for the board whose findings the court is not authorized to review, beyond determining whether the record discloses any competent legal evidence, direct or inferential, to support facts necessarily found by the board as a basis for its conclusions of law.

In the Foley Case there were various contentions and entanglements which are not to the point here, beyond a possible shading of permissible inference. but it appeared in that case plaintiff when injured was a motorman on defendant's railway, running an electrically propelled car in the city of Detroit, an employment of responsibility in the business of railroad transportation of passengers, presumably requiring training, skill, and judgment beyond that of a common laborer. He had worked as a machinist's helper in a railroad shop, and had practical training in railroading as a fireman on a steam road. In the accident which befell him on July 22, 1913, he sustained a compound fracture of the left leg, which confined him in the hospital until February 17, 1914. The surgeon

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in charge testified that under "usual circumstances" the injury would "undoubtedly have caused him to lose his leg by amputation," and when discharged neither perfect union of the bone nor normal circulation were restored or established in it. There was testimony that at the time of hearing the injured limb was shortened three-quarters of an inch with a 75 per cent. loss of normal use and strength, and he was totally incapacitated for work as a motorman. Shortly after the accident an agreement under the statute for weekly compensation during total disability was approved by the board. After he left the hospital plaintiff was given employment by defendant as a watchman in one of its car barns, and an adjustment made by defendant with him, discontinuing the weekly payments under the compenstion law without approval of the board. He made application to the board for their reinstatement while yet in defendant's employ as a watchman, and, whatever the merits of that phase of the case, under the facts it appeared that before the proofs were closed he had been discharged, and, so far as shown, was then without employment. The original agreement approved by the board was for total disability of indefinite duration. The board had never approved its discontinuance, and, acting in harmony with other provisions of the act, it had authority (under section 14, part 3) to end, diminish, or increase such payments on a review of the original award. This court held the order of the board would not be disturbed, as there appeared to it some testimony, viewing the case in its entirety, tending to support facts essential to its validity.

In the Jameson Case, plaintiff, when injured, seriously as is undisputed, was working in a responsible position as foreman for defendant at certain pile driving operations, and was an expert in that line, with long experience in the construction and operation of derricks and other machinery essential to such work. There was evidence that his work in that capacity included repairing pile drivers and other equipment requiring strength and agility in high and dangerous places, with a steady and clear head, for resumption of which his injuries totally and permanently incapacitated him. His subsequent employment was of a different character. Following the Foley Case, it was held that there was testimony to support the board's order, and it would not be disturbed.

As the instant case now stands on the undisputed testimony, the findings of the board essential to the validity of its order is without evidential support. We think the Miller Case controlling, and the order appealed from must be set aside. Certain of the views expressed by the board in that case as to the uncertainty of plaintiff's future condition and his possible part or total disability to work as a common laborer in the near future seem somewhat pertinent here. No final order has been made by the board, and on remission of the case it yet has jurisdiction.

The order will be set aside, without costs to either party, and the case remanded for such further review of the original award, in harmony with this opinion, as parties may apply for and future conditions warrant under the statute.

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STATE EX REL. D. M. GILMORE CO. v. DISTRICT COURT OF HENNEPIN COUNTY, FOURTH JUDICIAL DIST., ET AL.

(No. 22008.)

(Supreme Court of Minnesota. Oct. 8, 1920.)

179 Northwestern Reporter. 216.

(Syllabus by the Court.)

MASTER AND SERVANT—COMPENSATION FOR INJURY TO TEAMSTER LET WITH TEAM HELD PROPERLY AWARDED AGAINST TEAM OWNER AS "EMPLOYER."

Relator, who lets its rig, team, and teamster to do hauling at stipulated monthly payments out of which relator paid the teamster weekly wages, is responsible to the teamster, under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195–8230), for an accident occurring to the teamster while so hauling for the one to whom he was let.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employer.)

Certiorari by the State of Minnesota, on the relation of the D. M. Gilmore Company, against the District Court of Hennepin County, Fourth Judicial District, and others, to review a judgment against the Company on a claim under the Workmen's Compensation Act. Judgment affirmed.

John F. Bernhagen, of Minneapolis, for relator.

Chas. S. Allbright, of Minneapolis, for respondents.

HOLT, J. Certiorari to review a judgment in a claim under the Workmen's Compensation Act.

The facts were for the most part stipulated. The D. M. Gilmore Company and the McArdle Gilmore Company are Minnesota corporations doing business in Minneapolis. J. K. Gilmore is the president and principal stockholder of each corporation. On October 1, 1911, a contract was made between the two corporations whereby, for a specified monthly payment, the D. M. Gilmore Company let to the McArdle Gilmore Company a rig, team, and teamster, one Fred Mattson, who then was and for many years previously had been in the employ of the D. M. Gilmore Company. While so engaged hauling for the McArdle Gilmore Company, Mattson was accidentally killed. At that time D. M. Gilmore Company was receiving $200 per month under said contract for the use of the rig, team, and Mattson, out of which it paid Mattson a weekly wage of $19.50. The court found that there was no contract of hire between Mattson and the McArdle Company, but that such contract existed between him and the D. M. Gilmore Company, and that he was the employee of the last-named company when he met death in an accident arising out of and in the course of his employment. Judgment was awarded against the D. M. Gilmore Company.

The claim is made that the McArdle Gilmore Company is the only one liable under the act, because the accident arose out of and in the course of its business. In the absence of statutory provision fixing the party responsible, there would be much force to relator's contention; but subdivision "d," § 8230, G. S. 1913, reads:

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"The term 'employer' as used herein shall mean every person not excluded by section 8 (8202), who employs another to perform a service for hire, and to whom the 'employer' directly pays wages."

The contract of employment was between the D. M. Gilmore Company and Mattson, and the wages agreed upon were paid him directly by that company weekly. This by the plain language of the statute fixes the responsibility of employer upon the D. M. Gilmore Company as far as Mattson and his dependents are concerned. The Legislature, no doubt, intended to place the burden for accidental injuries upon the business in the conduct of which the accident occurs; but to avoid disputes and uncertainties as to the one directly responsible to the employee the above definition was incorporated in the law. And in the light thereof the conclusion may well be reached that the D. M. Gilmore Company made teaming for the McArdle Company part of its business when it hired out its team and teamster for that purpose. The stipulated facts do not demand a finding that the McArdle Company employed Mattson or that the accident to him did not arise out of or in the course of his employment as the servant of the D. M. Gilmore Company.

The judgment affirmed.

STATE EX REL. GEORGE D. TAYLOR & SONS ET AL. v. DISTRICT COURT OF RAMSEY COUNTY ET AL. (No. 21953.)

(Supreme Court of Minnesota. Oct. 8, 1920.)

179 Northwestern Reporter, 217.

(Syllabus by the Court.)

MASTER AND SERVANT — COMPENSATION FOR DEATH FROM APOPLEXY DEVELOPING AFTER INJURY HELD JUSTIFIED BY EVIDENCE.

Findings of the trial court in an action under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195–8230) *held* sustained by sufficient competent evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari by the State of Minnesota, on relation of George D. Taylor & Sons, employer, and the Southern Surety Company, insurer. against the District Court of Ramsey County and Chas. C. Haupt, one of the Judges thereof, to review a judgment against the employer and the insurer in proceedings under the Workmen's Compensation Act. Affirmed.

Russell P. Fischer, of Minneapolis, for relators.

Clifford L. Hilton, Atty. Gen., and K. G. McManigal. of St. Paul, for respondents.

BROWN, C. J. Certiorari in review of a judgment rendered in proceedings under the Workmen's Compensation Statute (Gen. St. 1913, §§ 8195–8230). The facts are as follows:

Defendant is a manufacturer and dealer in woodenware articles of trade, and owns and operates in its factory department a machine for sawing and shaping boards and like material for use therein. Plaintiff's intestate, who was her husband, was in defendant's employ, and at the time of the accident complained of was engaged in operating one of

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those machines; that being the work assigned to him by defendant. In some way his right hand came in contact with the saw while in motion, cutting off three fingers near the knuckle, and the fourth or little finger between the knuckle and phalange joints. The accident occurred on the 7th day of August, 1918, and he died on the 13th day of October following; the immediate cause of death being the third of a series of apoplectic strokes occurring at intervals following the injury to the hand, On the theory and claim that the injury and shock therefrom superinduced and brought on the apoplectic condition of decedent, therefore the proximate cause of his death. this action was commenced to recover the amount provided for by the Workman's Compensation Statute. The trial court found the facts in harmony with plaintiff's claim and ordered judgment accordingly.

The only question presented is whether the evidence, within the rule guiding this court in such cases is sufficient to support the findings of the trial court. Though the evidence does not leave the question entirely free from doubt, a careful consideration thereof leads to an affirmative answer; therefrom reasonable minds may reach different conclusions, thus making the question one of fact for the trial court. State ex rel. Neissen v. Dist. Court of Ramsey County, 142 Minn. 335, 172 N. W. 133. Decedent was 61 years of age at the time of his injury. Immediately following the accident he was taken to the hospital, where he was given an anesthetic, followed by proper surgical treatment. He remained at the hospital six days, and while there and some two days after the injury suffered a slight apoplectic stroke; his left side being affected, with paralysis of the face and loss of power of speech. He recovered from the shock, and when he left the hospital was apparently in his normal condition, barring the injury to the hand. He suffered another and more severe stroke on the 13th of August, from which he made only a partial recovery, and a third stroke on October 10, 1918, resulted in his death three days later. The medical testimony tends to show that the injury was a severe nervous shock to decedent's system, reducing the power of resistance of the tissues of the body, bringing on or causing an embolismic condition which in turn caused the apoplectic strokes, the third of which resulted in the death of decedent. The credibility of this evidence was for the trial court. It was competent and was accepted by that court, and the decision below based thereon. We find from the record no sufficient reason for disapproval of that conclusion.

Judgment affirmed.

WOLD v. CHEVROLET MOTOR CO., Inc. (No. 22036.)

(Supreme Court of Minnesota. Oct. 8, 1920.)

179 Northwestern Reporter, 219.

(Syllabus by the Court.)

1. MASTER AND SERVANT—SHOOTING BY SHERIFF'S POSSE SHOWN TO BE ACCIDENTAL INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Defendant's employee, whose duties required him to visit the local agents or dealers in the state and get in personal contact with them, was killed when a sheriff's posse attempted to stop an automobile in which he

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was riding at the invitation of one of such local dealers. It is held that the findings that the injury was accidental, and that it arose out of and in the course of the employment, are sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—SHOOTING HELD NOT TO SHOW TO BE INJURY BY THIRD PERSON WITHIN COMPENSATION ACT.

The evidence does not call for a finding that the employee was injured by the act of a third person or fellow employee intended to injure him because of reasons personal to him, so as to be excluded by subdivision (i), § 8230, Gen. St. 1913, from compensation.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from District Court, Yellow Medicine County; Richard T. Daly, Judge.

Proceedings under the Workmen's Compensation Act by Otto Wold, as guardian of the estate of Evelyn Wold, a minor, against the Chevrolet Motor Company, Incorporated, employer of H. O. Wold, for compensation for his death. Compensation awarded, and the employer attacks the judgment by certiorari. Judgment affirmed.

Watson, Sexton & Mordaunt, of St. Paul, for appellant.

Arthur E. Nelson and Gerhard Bundlie, both of St. Paul (Bundlie & Kelley, of St. Paul, of counsel), for respondent.

HOLT, J. In the attempt by a sheriff's pose to stop an automobile in which H. O. Wold was riding he was accidentally shot and died from the wound. His minor children were awarded judgment against his employer. By certiorari this judgment is attacked.

Relator Wold's employer manufactures and sells automobiles. Its manager, who hired Wold as salesman, testified that as such salesman it was his duty to visit the local agents or dealers of the company and help them organize their territory and secure subdealers therein; that personal contact with these local agents or salesmen was one of the main points of the road salesman's visits to them; that his duties were manifold, and could be performed at any time night or day; that he was to entertain to a certain extent, and it might be good practice to take pleasure rides with the local agents or dealers. Prescott Winter was relator's local dealer at Granite Falls, and he had subdealers at Renville and Clarkfield. On the evening of September 30, 1919, Wold called at Winter's place of business, and introduced himself. After some conversation, Winter invited him to take a ride in his car, a large Buick, also his subdealer at Renville, who was there, and another person, and directed a servant to accompany them. First a disabled car was towed from another garage to Winter's, then they started west on the road to Clarkfield. Winter was driving, and Wold was with him in the front seat. The record is silent as to the purpose of the drive, or as to any conversation in regard thereto with Wold. It appears, however, that the latter expressed a desire to finish his business that night so that he might leave Granite Falls early the next day. On the trip to Clarkfield Winter's actions indicated mental derangement, but not to such an extent as to cause the four able-bodied men to interfere with his driving, even when done at high speed. We may infer from the record that the sheriff at Granite Falls had been informed that a large Buick car had been stolen at Watertown, Minn., and

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was speeding west, and that Winter's action in stopping the occupants of a Ford car that came up behind the party as they were gonig to Clarkfield had been telephoned to the sheriff, for he notified his deputy at Clarkfield to summon aid and intercept the large Buick en route to Clarkfield. The deputy secured a number of men, some of whom were armed, and posted them along the road entering the village from the east. As Winter came along at high speed with the muffler open, the deputy sheriff and his aids sought to stop the car, and when the command was not heeded some of the men fired, attempting to hit the tires, as they had been instructed. A bullet struck Wold, causing his death.

[1] The finding that the injury to Wold was accidental must be sustained, for there is no evidence that any of the shooters intended to hit the occupants of the car. At most they purposed to puncture the tires so as to recover the car or apprehend the supposed criminals in charge of it. Nor is there any difficulty in sustaining the finding that the ride to Clarkfield was in the course of Wold's employment, in view of the testimony of Mr. Stimson, relator's manager, as above outlined, and as more clearly brought out by these questions and answers from the record, viz.:

"Q. Would you consider it good business for one of your salesmen to at times take a pleasure ride either at his own suggestion or at the suggestion of the local agent, in connection with his work? A. I have oftentimes been out in the field and taken those rides. It is difficult to know whether they are good business or not all the time; sometimes it is necessary and sometimes it is not. It is permissible, however, and seems to be the practice. Q. In the event, Mr. Stimson, that in your duties as a salesman—going back to that time—you called upon a local dealer for the first time, and you were invited to ride with him, whether upon an investigation trip of any kind or otherwise, would you ordinarily consider it good business to go with him? A. Yes, I would. Q. Would you, Mr. Stimson, consider it a part of a salesman's duty to accept such invitation from the local agent, whom he had met for the first time or otherwise? A. I have oftentimes done so myself, and we leave that up to the pleasure and judgment of the salesman; that is up to his own judgment."

Wold being in the course of his employment when riding with Winter and when injured, the conclusion of the trial court that the accidental injury arose out of the employment cannot well be said to lack evidentiary support. Had he received an injury while so riding either in a collision or the overturning of the automobile, whether through the carelessness of the driver or other cause, there could be little doubt but that the accident arose out of the employment. The fast driving, in this instance, the driver's failure to hear or heed the warning to stop, and the conditions created in part by his previous conduct on the trip, caused the sheriff to attempt to stop the car, and the accident to Wold resulted. The automobile was an instrumentality contemplated to be used in the performance of the employee's duties. When by the mismanagement or the attempt to manage or control an instrumentality, properly made use of in the employment, an accidental injury results to an employee the accident must be held to have arisen out of the employment. Some courts have stated the rule to be that the accident arises out of the employment when it can be said reasonably to have been contemplated as the result of the exposure of the employment. Hewitt's Case, 225 Mass. 1, 113 N. E. 572, L. R. A. 1917B, 249. Even by that rule it may be said that in automobile transportation the risk of being stopped by officers of the law for speeding or other traffic violations is a risk reasonably to be anticipated for it remains true that drivers of such vehicles often do violate statutes and ordinances.

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[2] The claim cannot be sustained that compensation is excluded by the provision that it does "not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of hs employment" (subdiv. [i], § 8230, G. S. 1913), for it is plain on the facts that neither Winter nor any one in the sheriff's posse intended to harm Wold. The cases cited by relator, such as Blake v. Head, 5 B. W. C. C. 303, Murphy v. Berwick, 43 Irish Law Times, 126 Armitage v. Lancashire, etc., Co., 2 K. B. 178 [1902], Mitchinson v. Day Bros. 1 K. B. 603 [1913], Schmoll v. Weisbrod & Hess Brew. Co., 89 N. J. Law, 150, 97 Atl. 723. Walther v. Am. Paper Co., 89 N. J. Law, 732, 99 Atl. 263, Harbroe's Case, 223 Mass. 139, 111 N. E. 709. L. R. A. 1916D, 933, and State ex rel. v. District Court, 140 Minn. 470, 168 N. W. 555, were decided upon the principle expressed in the exclusion clause above quoted in our act. The instant case on this feature is analogous to the one of Foley v. Home Rubber Co., 89 N. J. Law, 474, 99 Atl. 624, where the employee met death in the sinking of the Lusitania. There the court said:

"The present case is clearly distinguishable from the cases referred to in which compenstion was denied, in that it cannot be properly said here that there was any malicious design on the part of the German naval forces against Foley or any other passenger, and it may be safely assumed that the prime object of the German naval forces was to destroy the enemy's ship, and not the lives of its passengers."

So we may say here when the driver failed to stop the car the main purpose of the sheriff's posse in making use of the guns was to disable the car and not its occupants.

Hewitt's Case, supra, cited by relator, presents a case where a soliciting insurance agent was injured in an automobile accident. The court said:

"In the prosecution of the business of soliciting insurance Hewitt was independent. While authorized and expected to go where there was any reasonable prospect of securing a customer, his time and his method of procedure were his own. He might travel on foot, on horseback, by trolley, train, or automobile. He might write, telephone, or telegraph. He was wholly free as to time, place, or weather."

Under those circumstances it was held that—

"The injury could not be said reasonably to have been contemplated as the result of the exposure of the employment."

In the case at bar the employee was engaged as a traveling salesman, and under such cases as State ex rel. McCarthy Bros. v. Dist. Court, 141 Minn. 61, 169 N. W. 274, and State ex rel. London & L. Indemnity Co., 141 Minn. 348, 170 N. W. 218, we think he was protected when on the trip he was taking.

Judgment affirmed.

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MUCHA v. MORRIS & CO. (No. 21391.)

(Supreme Court of Nebraska. Oct. 4, 1920.)

179 Northwestern Reporter, 500.

(Syllabus by the Court.)

MASTER AND SERVANT — NOTICE OF APPEAL FROM COMPENSATION AWARD MAY BE WAIVED.

The notice required to be filed with the Compensation Commissioner within seven days after an award (Laws 1917, c. 85, § 29, subd. "g") is intended to give information of the appeal to the opposing party, and may be waived by him, where the petition for review is filed in the district court within the time required by law.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

Appeal from District Court, Douglas County; Day, Judge.

Action under the Workmen's Compensation Act by Miles Mucha, by Joseph Mucha, his next friend, against Morris & Co. for compensation for a personal injury. After an award for claimant by the Compensation Commissioner, claimant filed a petition in the district court to review the award, and from its dismissal of such petition, he appeals. Reversed, and cause remanded.

A. H. Bigelow, of Omaha, for appellant.

J. C. Kinsler, of Omaha, for appellee.

FLANSBURG, J. Action under the Workmen's Compensation Law. Plaintiff, who had sustained personal injuries, was given an award of compensation by the Compensation Commissioner on December 6, 1918. On December 16, 1918, he filed a petition in the district court to review the award. The district court dismissed the petition on the ground that plaintiff had not filed notice of intention to appeal, as required by subdivision "g," § 29, c. 85, Laws 1917, which reads:

"Every order and award of the Compensation Commissioner shall be binding upon each party at interest unless notice of intention to appeal to the district court has been filed with the Compensation Commissioner within seven days following the date of rendition of the order or award: Provided, that the order and award shall be binding and final, notwithstanding notice of intention to appeal has been filed within the time limit, until the appeal has been perfected and service had upon the opposite party or parties."

Plaintiff contends that the filing of notice was waived by defendant's attorney, both orally within the seven-day period and by a written voluntary appearance of the defendant filed in the district court on December 19, 1918, reciting that—

"Defendant hereby waives summons and voluntarily agrees to appear in the above-entitled action."

Whether or not there was any conversation whatsoever during the seven-day period purporting to be a waiver of notice is directly disputed in the testimony. That was a question of fact for the trial court, and will therefore not be further considered here. The only question now presented is whether or not the written voluntary appearance filed in the district court was a waiver of the filing of notice with the Compensation Commissioner.

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The statute of 1917 did not limit the period for the filing of the petition for review in the district court to seven days, as it does now. Laws 1919, c. 91, § 5. It is not urged that the petition on appeal was filed out of time. The appeal was in every particular, except the filing of the notice with the Compensation Commissioner, completed within the time required by law. The case of Jefferson Hotel Co. v. Young (Ind. App.) 121 N. E. 94, differs in that regard from the one before us.

The provision for the filing of notice with the Compensation Commissioner was for the purpose of giving the adverse party knowledge of the appeal. Upon the filing of such notice, no further duty devolved upon the Compensation Commissioner. The filing of such notice did not affect the award; on the other hand, the award continues to be binding until the appeal is perfected and service had. It is apparernt that such notice is for the benefit of the opposing party, and in such cases it is generally held that the party for whose benefit the provision is made may waive the giving of the formal notice, and that this may be done by a voluntary appearance in the court where the appeal is lodged. 3 C. J. 1240, § 1343, and page 1241, § 1345. That rule is in line with the holdings of our court. Shold v. Van Treeck, 82 Neb. 99, 117 N. W. 113; McDonald v. Penniston, 1 Neb. 324; Haylen v. Missouri P. R. Co., 28 Neb. 660, 44 N. W. 873; State v. Shrader, 73 Neb. 618, 103 N. W. 276.

It is our opinion that the district court had jurisdiction of the subject of the action given by statute by the timely filing of the petition for review, and that the voluntary appearance filed in the case conferred upon the court jurisdiction of the person of the defendant.

The judgment of the lower court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

Day, J., not sitting.

PERRY v. W. L. HUFFMAN AUTOMOBILE CO. (No. 21298.)

(Supreme Court of Nebraska. Oct. 4, 1920.)

179 Northwestern Reporter, 501.

(Syllabus by the Court.)

1. MASTER AND SERVANT—PREREQUISITES TO CONTRACT FOR COMMUTATION OF COMPENSATIION STATED.

In entering into an agreement under the Workmen's Compensation Act to discharge the employer from all liability for a permanent disability of the employee upon payment of a lump sum in lieu of periodical payments, the parties are not at liberty to make a settlement at variance with statutory terms; and ascertainment of the amounts of compensation payable periodically under the law is a prerequisite to a contract for commutation. Laws 1917, c. 85, § 16, amending section 3681. Rev. St. 1913.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

2. MASTER AND SERVANT—COMMUTATION OF COMPENSATION SUBJECT TO COURT'S APPROVAL.

In the approval of a commutation of an employee's compensation from periodical payments to a payment in gross, the public has an interest which it is the duty of the court to protect without regard to the wishes of the parties.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

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3. MASTER AND SERVANT—COMMUTATION OF COMPENSATION TO IMPROVIDENT EMPLOYEES OR DEPENDENTS NOT CONTEMPLATED.

The Workmen's Compensation Act does not contemplate the payment of large sums of money to improvident employees or dependents who may lose it and become a charge on the public, but as a general rule requires employers to pay injured employees compensation in small periodical payments at short intervals.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

4. MASTER AND SERVANT—COMMUTATION OF COMPENSATION ALLOWABLE ONLY UPON STATUTORY TERMS.

Under the Workmen's Compensation Act, in cases of death or permanent disability, commutation or payment in a lump sum by approved agreement is a departure from the general rule, and should only be sanctioned upon the statutory terms relating to the exception.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

5. MASTER AND SERVANT—COMMUTATION OF COMPENSATION DEPENDENT ON EXTENT OF INJURY.

Under the Workmen's Compensation Act the nature and the extent of the injury are material inquiries upon an application for the approval of an agreed commutation from periodical payments to a lump sum for a permanent disability.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

6. MASTER AND SERVANT—COMMUTATION OF COMPENSATION TO BE APPROVED BY COMMISSIONER BEFORE APPROVAL BY COURT.

The authority to approve a commutation from periodical payments to the payment of a gross sum for a permanent disability has been committed by the Workmen's Compensation Act to the district court, but the settlement should be submitted to the Compensation Commissioner for his approval before the district court is asked to approve the commutation.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Appeal from District Court, Douglas County; Sears, Judge.
On rehearing. Former opinion modified.
For former opinion, see 175 N. W. 1021.

Anson H. Bigelow, of Omaha, for appellant.
Clarence A. Davis, Atty. Gen., and J. B. Barnes, Deputy Atty. Gen., amici curiæ.
Brome & Ramsey and Jos. P. Uvick, all of Omaha, for appellee.

ROSE, J. This is a proceeding under the Workmen's Compensation Act. Plaintiff fell from a ladder June 20, 1918, and broke two bones in his left ankle, while performing the duties of a carpenter in the employ of defendant for $18 a week. The injury resulted in "a permanent partial loss" of the use of a foot within the meaning of the statute, and plaintiff is entitled to compensation accordingly. Laws 1917, c. 85, § 7. Defendant paid and plaintiff received regular weekly payments of $12 for 12 weeks amounting to $144. Afterward the parties agreed to settle plaintiff's entire claim for the lump sum of $500. This settlement was presented to the district court for Douglas county, and it was approved July 10, 1919. Defendant was directed to pay plaintiff the unpaid balance

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of $356 in full satisfaction of the latter's claim for compensation, and that sum was so paid and accepted. At the same term of court, August 30, 1919, plaintiff filed a motion to vacate the settlement on the grounds, among others, that he did not receive the full compensation allowed by law, that the amount due him had not been determined by either the Compensation Commissioner or the district court, and that the commutation as approved was unauthorized. Upon a hearing of this motion on its merits it was overruled October 4, 1919. Plaintiff appealed. The review here resulted in the opinion that the district court did not err in overruling plaintiff's motion to vacate the judgment approving the settlement. Perry v. Huffman Automobile Co., 104 Neb. ——, 175 N. W. 1021. A rehearing was granted, and the case has been reargued.

Did the district court err in overruling the motion to vacate the settlement? In approving the agreement did the trial court require the parties to comply with the statute under which both sought relief or protection?

[1] In entering into an agreement to discharge the employer from all liability for a permanent disability of the employee upon payment of a lump sum in lieu of periodical payments, the parties are not at liberty to make settlements at variance with statutory terms; and ascertainment of the amounts of compensation payable periodically under the law is a prerequisite to a contract for commutation. Laws 1917, c. 85, § 16, amending section 3681, Rev. St. 1913.

[2] In the approval of a commutation of an employee's compensation from periodical payments to a payment in gross, the public has an interest which it is the duty of the court to protect without regard to the wishes of the parties. The act creates new remedies and new liabilities. The manner in which it operates is found in the legislation itself. Its remedies, if invoked, interfere more or less with the freedom of contract and must be applied on the terms granted.

[3] The Workmen's Compensation Act does not contemplate the payment of large sums of money to improvident employees or dependents who may lose it and become a charge on the public. To prevent injured employees and dependents from squandering or losing their means of support, the Legislature, on grounds of public policy, has adopted the system of requiring employers to pay compensation for injuries in small periodical payments at short intervals for a definite period.

Commutation or payment in a lump sum by approved agreement of the parties is a departure from the general rule, and should only be sanctioned upon compliance with the statutory terms relating to the exception.

[4, 5] Facts disclosing compliance with the provisions governing the exception are subjects of inquiry on the hearing of every application for the approval of a lump sum in lieu of periodical payments. In the present case some of the facts essential to a compliance with the exception were not before the trial court when the settlement was approved. Evidence from which the nature and the extent of the injury could be determined was wanting. The settlement had not been presented to or approved by the Compensation Commissioner. Without accurate knowledge of the nature and the extent of the injury, the compensation to which plaintiff is entitled is unknown, and compensation based on the injury is a material factor in the approval of an agreement for commutaton. "The probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests," is the statutory method of determining the lump sum payable in lieu of periodical payments. Laws 1917, c. 85, § 16. There is no other standard for commutation. Any method reducing the compensation

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thus ascertained is unauthorized as a basis for the approval of a settlement. The Workmen's Compensation Act, as amended in 1917, contains the following provisions:

"The amounts of compensation payable periodically under the law, by agreement of the parties with the approval of the Compensation Commissioner, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability, which may be commuted only upon the order or decision of the district court; Provided, that where commutation is agreed upon, or ordered by the court, the lump sum to be paid shall be fixed at an amount which will equal the total sum of the probable future payments, capitalized at their present value upon the basis of interest calculated at five per centum per annum with annual rests." Laws 1917, c. 85, § 16.

"All disputed claims for compensation or for benefits under this article must be submitted to the Compensation Commissioner." Laws 1917, c. 85, § 13.

"Reports of accidents and settlements shall be made in form and manner as prescribed and directed by the Compensation Commissioner." Laws 1917, c. 85, § 20.

The Compensation Commissioner is charged with the duty of executing all provisions of the act. Laws 1917, c. 85, § 27. Every claim for benefits may be presented to the Compensation Commissioner for adjudication and award. Laws 1917, c. 85, § 29. A copy of all settlements must be filed with the Compensation Commissioner. Laws 1917, c. 85, § 12.

While the authority to approve a lump sum for a permanent disability has been committed to the district court, it seems to have been the intention of the Legislature, as disclosed by the entire act, to require the parties to submit their agreement to the Compensation Commissioner before asking the district court to approve the commutation.

[6] In the commutation of plaintiff's compensation, therefore, there was a failure to comply with the Workmen's Compensation Act. The amounts of compensation payable periodically under the law had not been ascertained. The settlement had not been presented to the Compensation Commissioner for examination and approval. The nature and the extent of the injury had not been shown. It follows that there was error in the overruling of the motion to vacate the judgment approving the settlement. In the further proceedings, however, defendant should be credited with the payments already made. The former opinion is modified to conform to these views.

Reversed and remanded.

Day and Dean, JJ., not sitting.

BJORK v. U. S. BOBBIN & SHUTTLE CO.

(Supreme Court of New Hampshire. Hillsborough. April 6, 1920.)

111 Atlantic Reporter, 284.

1. MASTER AND SERVANT — EMPLOYER, ACCEPTING COMPENSATION ACT, MAY PLEAD COMMON-LAW DEFENSES IN SUIT AT LAW.

Under Employers' Liability and Workmen's Compensation Act, §§ 2-4, employer, who has accepted the Compensation Act, may interpose

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the common-law defenses in an action by an employee who elected to proceed at common law.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

Transferred from Superior Court, Hillsborough County; Branch Judge.

Action by Arved L. Bjork, by his next friend, against the United States Bobbin & Shuttle Company. Verdict for plaintiff, and case transferred to the Supreme Court on defendant's exceptions. Exceptions sustained.

Case for injuries received while in the defendant's employ. Trial by jury, and verdict for the plaintiff. The defendant had duly accepted the provisions of Employers' Liability and Workmen's Compensation Act. Laws 1911, c. 163.

The plaintiff, who was 16 years of age at the time of the injury was employed to take away from a saw fed by another employee. He was so engaged about 5 hours in the forenoon of the day of his employment. In the afternoon he was given other work, and the next morning at his request was again put on the saw, and was injured soon after beginning work. He was instructed to be careful not to get his hands upon the saw and appreciated that danger. His evidence tended to prove that a piece of wood which he had grasped to take away from the saw suddenly sprang or jumped back, dragging his hand upon the saw and causing the injury; that this kicking or jumping back of the material being sawed was something likely to occur; that he did not know this danger, and was not warned of it by the defendant or instructed how to avoid injury thereby. The defendant requested the court to instruct the jury that, if they found the injury was not due to any jumping or shooting back of the piece of wood, as the plaintiff claimed, their verdict should be for the defendant, and excepted to the failure to give this instruction, and to the instruction that there was no evidence the plaintiff assumed the risk of injury from the jumping back of the stick that was being sawed, and that the jury could not find the plaintiff assumed the risk of injury, if they believed it was so caused. There were also exceptions to the argument of counsel.

Taggart, Tuttle, Wyman & Starr and L. E. Wyman, all of Manchester, for plaintiff

Streeter, Demond, Woodworth & Sulloway and Jonathan Piper, all of Concord, for defendant.

Parsons, C. J. [1] The enlarged liability to employees imposed upon the employer in certain employments under chapter 163, Laws 1911, by section 2 of the act does not apply to an employer, who has accepted the provisions of the act. Id. § 3. In such case the existing right of action at common law is preserved to employees who elects such action, insteayd of the compensation established by the act. Id. § 4. Hence the present action is at common law and the statute is inapplicable. The jury, therefore, were properly instructed that the plaintiff to recover must establish his own freedom from fault, that the injury arose from a risk which he did not assume, and that the defendant's negligence caused the injury.

His claim was that he was injured by the sudden jumping back of the piece of wood which was being sawed; that such an event was so common that it was negligence in the defendants not to warn him of the danger; that he had no knowledge of it, and was not warned or instructed with reference to it. The defendants concede that there was evidence for the jury in support of the plaintiff's contentions, but they insist upon their exception to the instruction given the jury, after the general ones above

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referred to, that there was no evidence that the plaintiff assumed the risk of injury from the jumping back of the stick which was being sawed, and that they could not find he assumed the risk if his injury was so caused.

[2, 3] The burden of proof as to the nonassumption of risk was on the plaintiff. Richardson v. Co., 77 N. H. 187, 189, 90 Atl. 174; Hicks v. Co., 74 N. H. 154, 157, 65 Atl. 1075; Burnham v. Railroad, 68 N. H. 567, 568, 44 Atl. 750. Consequently, under the authorities and the law of the case as laid down earlier in the charge, the absence of evidence tending to show the plaintiff assumed the risk would not justify the instruction that the jury could not find the plaintiff assumed the risk. As the burden of proving nonassumption rested with the plaintiff, the only finding possible, if there were no facts in proof from which inferences could be drawn, was necessarily against the plaintiff. To recover, as stated in Burnham v. Railroad, 68 N. H. 567, 568, 44 Atl. 750:

"The plaintiff was bound to prove * * * that the risk * * * by which he was injured was not assumed by him."

In that case complaint was made of the presence of unblocked frogs in the railroad yard in which Duquette, the plaintiff's decedent, worked as the cause of his injury. Duquette's testimony not being available, and the inferences deducible from the facts in proof tending to establish knowledge rather than ignorance on his part of the unblocked condition of the yard, it was held there was nothing for the jury. In the present case it is conceded the facts proved authorize the inference that Bjork did not know the danger which he alleges as the cause of his injury; but, because the jury might find the issue favorably to the plaintiff, it does not follow that they are required to do so as matter of law, which was the necessary effect of the instruction that this issue could not be found for the defendants.

Though the plaintiff testified at length to his lack of acquaintance with sawing machinery, that he had never been instructed as to the possibility of the stick, which was being sawed, jumping or being drawn back, and that he had not, as he remembered, seen a stick drawn back while it was being sawed, he was not asked and did not testify directly as to his knowledge on the subject. While the evidence was clearly sufficient to authorize the jury, if they believed the plaintiff, to find his ignorance, the explanation of his failure to assert his ignorance in terms was for the jury. Mechanics' Sav. Bank v. Feeney, 108 Atl. 295. To establish the defendant's negligence in failing to warn the plaintiff of the possibility of a stick flying back when beng sawed, the plaintiff introduced evidence that this was something which might frequently happen in sawing material such as was being worked. The weight of this evidence, as tending to establish similar jumping or flying back durng the plaintiff's five-hour employment the previous day, was for the jury. Whether the plaintiff assumed the risk was a question of fact, and the instruction disposing of the question as matter of law was erroneous.

[4] The jury were instructed that, if there was danger that the stick which was being sawed might jump or fly back, it was the defendant's duty to warn the plaintiff of the danger and to instruct him how to avoid it, and that if this duty was not performed, and the plaintiff's injury resulted from such failure of duty without fault on his part, the defendant was liable. The defendant requested the converse of this instruction that they were not liable unless the injury was occasioned as the plaintiff claimed. While it has been held that, if the jury are instructed in general terms as to the law applicable to the case, failure to instruct upon request as to the effect of particular evidence is not error, it is now considered that—

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"The fairness of a trial requires that the charge shall inform the jury what the law is in its application to the case, when a proper request therefor is made. Simoneau v. Railway, 78 N. H. 363, 100 Atl. 551, L. R. A. 1918A, 620.

With greater reason, in order to render the trial fair, when attention has been called to certain findings of fact as requiring a verdict for one party, it is necessary to inform the jury when requested that the failure to reach such conclusions requires a verdict the other way, unless the first party may properly recover upon other grounds. The plaintiff put his case upon the ground that he was injured in a particular way; his charge of negligence was of failure to warn him of this danger. As the case is understood no other claim was made except as to the position of the sword or dividing blade behind the saw, which as a ground of recovery was taken out of the case by the charge.

[5] After telling the jury that they could not find the plaintiff assumed the risk of injury from the particular danger of which he complained, they were told, if they found the injury happened in some other way, they should consider whether the risk causing the injury was one the plaintiff assumed. The jury must therefore have understood that, even if they found the stock did not jump back and drag the plaintiff's hand upon the saw, still upon some ground not pointed out they might find a verdict against the defendant. The issue made by the plaintiff was clear and distinct, and by it the case should have been determined. The position of the spreader being out of the case, the plaintiff contends in his brief that it was negligence, sufficient to authorize a recovery for the defendant, to put a boy of the plaintiff's age at work of this character. Whether the plaintiff could succeed on this basis or not, it is clear this was not the case tried.

[6] While under our practice a plaintiff is not required to allege in writing the details of the negligence upon which he relies, he cannot sustain a verdict upon grounds of negligence deducible from the evidence which were not presented at the trial. Gage v. Railroad, 77 N. H. 289, 90 Atl. 855, L. R. A. 1915A, 363. As the case is understood, this claim of liability was not raised at the trial. If it was not, the requested instruction should have been given.

Upon the motion for rehearing it has been argued that the statement of counsel, which was considered testimony, was in fact merely the statement of an inference legitimately deducible from the evidence. The argument is not without weight, and upon further consideration the court are not unanimous as to the view which should be taken of what was said. As the verdict must be set aside on other grounds, it is not necessary to pass on this exception. There can be no doubt, however, that what was said was dangerously near the line, even if it is possible to justify the expressions used. The argument which it is claimed counsel intended to make could easily have been made in such form that the charge of intentionally giving the jury information as to counsel's personal observation could not have been made. See Carpenter, J., in Mitchell v. Railroad, 68 N. H. 96, 117, 34 Atl. 674.

The order heretofore made is not disturbed.

Exception sustained.

Peaslee, J., was absent. The others concurred.

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STEPHENSON ET AL. v. STATE INDUSTRIAL COMMISSION OF OKLAHOMA ET AL. (No. 11086.)

(Supreme Court of Oklahoma. Sept. 21, 1920.)

192 Pacific Reporter, 580.

(Syllabus by the Court.)

1. PROVISIONS OF WORKMEN'S COMPENSATION LAW AS TO PAYMENT.

Workmen's Compensation Law (section 15, art. 2, c. 246, Sess. Laws 1915) provides that: "Compensation under the provisions of this act shall be payable periodically, in accordance with the method of payment of the wages of the employee at the time of his injury and shall be so provided for in any award; but the commission may determine that all payment or payments may be made monthly or at any other period, as it may deem advisable. The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump-sum payments, provided the same shall be in the interest of justice."

2. MASTER AND SERVANT—COMPENSATION COMMISSION'S FINDING OF DURATION OF INCAPACITY IS ONE OF FACT.

Under the foregoing section in an action for compensation, the duration of incapacity is a question of fact to be determined as other questions of fact are determined, and a challenge of the correctness of the commission's conclusion respecting the duration of incapacity will be considered on appeal in the same way as other challenges of a similar nature.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — COMMISSION'S FINDINGS OF FACT FINAL.

Under the provisions of section 10, art. 2, of the Workmen's Compensation Act (Laws 1915, c. 246) the decision of the state Industrial Commission is final as to all questions of fact.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—COMPENSATION IN LUMP DISCRETIONARY.

Workmen's Compensation Act, section 15, art. 2, supra, confers express power upon the commission to order the payment in one or more lump sums, instead of making an award of periodical payments. In every case the commission, when applied to for a lump sum payment, must exercise its judgment and discretion as to the best method of making compensation in the light of all facts, and the result will not be disturbed on appeal except for an abuse of the power.

(For other cases, see Master and Servant, Dec. Dig. §§ 385[20], 417[5].)

5. MASTER AND SERVANT—COMPENSATION IN LUMP SUM FOR TOTAL INCAPACITY HELD PROPER.

Record examined and *held*, that an award of compensation for total incapacity for the maximum period allowed by the Workmen's Compensation Act, and in a lump sum, will not be disturbed.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Higgins and Bailey, JJ., dissenting.

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Appeal from an Order of the State Industrial Commission.

Proceedings under the Workmen's Compensation Act by Robert Moncrieff, employee, against A. E. Stephenson, employer, and the Maryland Casualty Co., insurer, for compensation for personal injuries. From an order of the State Industrial Commission, finding that plaintiff's injury had resulted in permanent total disability and modifying its former award finding total temporary disability and awarding climant 500 weeks' compensation at the rate of $6 per week, the employer and insurer appeal. Order affirmed.

Ross & Thurman, of Oklahoma City, for appellants.

F. W. Herndon, of Enid, for respondent, Robert Moncrieff.

S. P. Freeling, Atty. Gen., and R. E. Wood and E. L. Fulton, Asst. Attys. Gen., for respondent, State Industrial Commission of Oklahoma.

JOHNSON, J. This is an appeal from an order of the State Industrial Commission, wherein Robert Moncrieff was the claimant, A. E. Stephenson, respondent, and the Maryland Casualty Company, a corporation, insurance carrier, and for convenience the parties will be hereinafter so referred to

The respondent and insurance carrier presents this appeal from the following order of the commission:

"Now on this 12th day of November, 1919, the above cause coming on for consideration on the application of claimant for a lump sum settlement, pursuant to a hearing held in Oklahoma City, Okl., on the 29th day of October, 1919, at which hearing claimant appeared by his attorney, F. W. Herndon, and respondent and insurance carrier by their attorney J. S. Ross, and the commission having carefully considered the reports on file and being well and sufficiently advised in the premises finds: "That under the award in this cause there has been paid or should have been paid to October 26, 1918, 56 weeks compensation at the rate of $6 per week, leaving a balance of 444 weeks, due at the rate of $6 per week, being for the total sum of $2,664, the present worth of which is $2,353.-73, and that it would be to the best interest of claimant in the interest of justice that the said sum of $2,353.73 be paid claimant in a lump sum.' 'It is ordered that within 20 days from this date the insurance carrier or respondent pay to claimant any compensation that may be due up to October 26, 1919, and also pay in a lump sum $2,353.73, in full, final, and complete settlement of this cause.' "

The record discloses that on September 16, 1918, the claimant, Robert Moncrieff, while in the employ of A. E. Stephenson, respondent, was injured in an elevator accident, and that on November 18, 1918, a claim for compensation was filed by the claimant, and the commission made and entered an award as for total temporary disability, and on August 12, 1919, on motion of the claimant to review the award made in his favor on November 18, 1918, the commission made and entered its order, finding that the injuries to claimant had resulted in permanent total disability, vacating the award of November 18, 1918, and awarding to the claimant 500 weeks compensation at the rate of $6 per week, being for the total sum of $3,000, less any sum which had been paid to him under the prior award. Of these findings and orders of the commission the respondent and insurance carrier make no complaint. The record discloses that the payments on such award were made by them as ordered.

The respondent and insurance carrier urge as grounds for reversing the order of the commission appealed from:

"(1) That the commission erred in making the said order for a lump sum settlement of the award made to the claimant, in that said order was not made in accordance with the provisions of the statutes of the state

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of Oklahoma; that the said award was made without any showing whatever that the said award was for the best interest of the parties to said proceeding, or to the best interest of the claimant in said proceeding, and that the said order was in fact made, not for the benefit of the injured workman, but was made for the benefit of the dependents of said workman in the event he should die.

"(2) That it considered only the present value of fixed future payments, when, under the law, it should have taken into consideration the age of the claimant, his situation in life, his physical condition, the probability of his condition being so improved that disability might end before all weekly payments should become due, and also the claimant's reasonable life expectancy, together with the probability that the claimant might die before all of said weekly payments and compensation should become due.

"(3) In that the said commission erred in making the said order for a lump sum settlement, without any evidence that the same was for the benefit of, either the claimant or the respondent and insurance carrier."

[1, 2] Section 15, art. 2, c. 246, Sess. Laws 1915, provides:

"Compensation under the provisions of this act shall be payable periodically, in accordance with the method of payment of the wages of the employee at the time of his injury and shall be so provided for in any award; but the commission may determine that all payment or payments may be made monthly or at any other period, as it may deem advisable. The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments, provided the same shall be in the interest of justice."

The claimant's application for lump sum payment alleged:

"1. That the claimant has a family, consisting of his wife and one child, and that the sum of $6 per week awarded this claimant is insufficient to provide the necessaries of life for himself and family at the present time, and that, while the claimant is permanently totally disabled for the performance of manual labor, his mind is still active and clear, and he is capable of handling funds and making investments of advantage, and has had experience in such matters and has been very successful in handling such matters. That if given the full amount of his compensation in a lump sum he will handle the same carefully and invest it or expend it judiciously and to his advantage, and he believes that he will be able to increase the amount thereof, and at the same time secure a much larger sum therefrom than he now receives from the weekly payments now being paid to him.

"Wherefore claimant asks that the total amount of the compensation awarded to him, or which may be awarded to him upon his motion to review the award, be paid to him in a lump sum, and for such other relief as the commission may deem just."

This application was verified by the claimant, and fully supported by affidavits of six business men of the city of Enid. The respondent's and insurance carrier's objections to the claimant's application were verified, and were as follows:

"Comes now insurance carrier, Maryland Casualty Company, and for its answer to the claimant's petition for a lump sum award objects to this petition being allowed for the following reasons: 'First. That the claimant has not, in the opinion of the insurance carrier, made sufficient show- to warrant the allowance of a lump sum. Second. This claimant testified at the hearing held in Enid, on August 8, 1919, that he is in the possession of real estate to the value of $6,000 consisting of two houses, valued at $3,000 each; that he lives in one of the houses, and has an income of $420 a year from his other house. The insurance carrier calls your attention to the fact that this man owns his home, has no house

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rent expense, that he has an income of $35 a month from his other property, or $420 a year. The insurance carrier is paying him $6 a week as per the award of the commission, or $312 per year, a total income of $732 and house rent.' Wherefore, insurance carrier believes that the petition of the claimant should be denied for the above reasons, and respectfully requests that the commission, if it so desires, to set this petition for hearing, otherwise grant the prayers of the insurance carrier to deny the claimant's petition."

The claimant had and filed with the commission at said hearing a contract of purchase with the owner of lot 1, block 9, in Marshall & Gannon addition to the city of Enid for a consideration of $2,600 and his affidavit as to his ownership of two houses and lots in the city of Enid, to wit, lot 2, block 14, Kenwood addition, and lot 2, block 1, Waverly addition to the city of Enid, showing that he had paid taxes on the first described property for the year 1919 of $33.84, and the second, $32.04, and the sum of $18 for insurance on the same and the sum of $15 for repairs and upkeep on the same during the year 1919.

The record discloses that at the prior hearing had in said cause by the commission on August 8, 1919, the claimant testified that he was 64 years of age on the day he received the injuries complained of, and that his disability on account of the injuries had been total ever since. Drs. Swank and B. T. Bitting testified on said former hearing that the claimant's injuries constituted total and permanent disability to perform labor. The record discloses that such testimony was before the commission, and considered by it at the time it made the order complained of. This, we think, sufficiently answers and refutes the respondent's and insurance carrier's objection to the commission's order complained of "that it considered only the present value of fixed future payments, when under the law it should have taken into consideration the age of the claimant, his situation in life, his physical condition, and the probability of his condition being so improved that disability might end before the weekly payments should become due, and also the claimant's reasonable life expectancy, together with the probability that the claimant might die before all of the said weekly payments and compensation should become due."

[3] It is provided in section 10, art. 2, Workmen's Compensation Act, that the decision of the Industrial Commission shall be final as to all questions of fact. This court has so held in Francis Vitric Brick Co. and Kansas Inter-Insurers' Exchange v. State Industrial Commission of the State of Oklahoma, and William E. Smith, 76 Okl. 314, 185 Pac. 525; Board of Commissioners of Cleveland Co. v. Barr et al., 173 Pac. 206.

[4, 5] Counsel for the respondent and the insurance carrier say in their brief:

"That during the course of this proceeding from the time they received the notice of the accident to this day they have never had the slightest desire or intention to question the rights of the injured man to compensation or to avoid the liability for its payment. * * * It paid medical bills and compensation under the award of the commission until the said award was vacated by the order of a lump-sum payment, all without the slightest protest. * * * On this appeal we desire to present to the court for its decision two questions: First. Under the admitted facts and uncontradicted testimony in this cause, was the commission justified in ordering the insurance carrier and the respondent to pay compensation in one lump-sum payment? Second. Uder the law of Oklahoma, should the commission in commuting periodical payments to one lump-sum payment, take into consideration the reasonable life expectancy of the claimant under all of the circumstances, for the purpose of determining the number of payments which would otherwise be payable?"

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We answer the foregoing questions in the affirmative. That part of section 15, supra, empowering the commission so to do, reads:

"The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump-sum payments, provided the same shall be in the interest of justice."

This provision seems clear and unambiguous. It leaves the matter of making an order for the payment of compensation in one or more lump sums entirely to the discretion of the commission, and express power is given to make such an order where it shall deem it advisable and in the interest of justice. The general rule of law is that, where an inferior tribunal is clothed with the exercise of its discretion in making an order or in rendering a judgment in an action or making an award in a special proceeding, the judgment rendered or the award made will not be set aside on appeal, unless it clearly appears that there was an abuse by such tribunal of its discretion in rendering the judgment or making the award complained of. Springfield Fire & Marine Ins. Co. v. Griffin, 166 Pac. 431; Cunningham v. Cromley, 54 Okl. 266, 153 Pac. 860; Duncan v. Eck, 166 Pac. 121; Arn v. Elms, 59 Okl. 235, 158 Pac. 1150; Stainbrook v. Meskill, 52 Okl. 196, 152 Pac. 820; Kemmerer v. Midland Oil & Drilling Co., 229 Fed. 872, 144 C. C. A. 154; Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244; Cain v. National Zinc Co., 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251; Roberts v. Chas. Wolff Packing Co., 95 Kan. 723, 149 Pac. 413; Reteuna v. Industrial Commission (Utah) 185 Pac. 535.

Counsel for the respondent and insurance carrier do not contend that the provisions of the act (section 15, art. 2, c. 246, Sess. Laws, 1915) does not authorize the commission to commute periodical payments to one or more lump-sum payments. Their position in relation thereto is stated in their brief as follows:

"It is apparent that it was contemplated by the Legislature that, as a general rule, compensation should be paid periodically, according to the method which was being followed in the payment of the employee's wages, but that in exceptional cases the commission might, if it deemed advisable, commute the payments to one or more lump-sum payments. In other words, when there was some reason for so doing in a particular case the commission might commute the payments, but even then only when the same should be in the interest of justice. In a Minnesota case it was said: "* * * All the authorities agree that the discretion, where it exists, to award a lump-sum judgment, should be sparingly exercised. In most cases it is much better for the workman and his family that the compensation be paid in installments corresponding to the payment of his wages. This is the plan of the act, and it is only in exceptional cases that the court should approve commutation." State v. District Court, 134 Minn. 16, 158 N. W. 713, L. R. A. 1916F, 957.

To the same effect is the case of Adams v. N. Y. etc., R. R. Co., 175 App. Div. 714, 161 N. Y. Supp. 919, the court saying:

* * * It is not the purpose of the Legislature to authorize the commission to emasculate this feature of the law or to virtually repeal the provision that 'compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award.' That stands as the general policy of the law, and the commission is without power to repeal it or authority to ignore it except in particular cases."

These seem to be the authorities principally relied upon to sustain their contention, while they cite many others, none of them go farther than the ones quoted supra, after which they conclude their argument in their brief as follows:

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"We say, therefore, to the court that it seems to us that on the application of the claimant for a lump-sum allowance the State Industrial Commission should have required proof of the physical condition of the claimant at the time of the hearing, and evidence of the average life expectancy of a man of his age in a similar physical condition, before it could determine the number of the future payments which would become due, and then determine the present value of that number of future payments, or, the commission should have refused to consider the application because it was not in the interest of justice to require the respondent and the insurance carrier to pay something which might never become due, on the one hand, or, on the other, speculate upon whether death or recovery would relieve the insurance carrier and the respondent from making of some of said payments."

In reviewing the award made, we have examined the entire record, and are of the opinion that such award should be affirmed; and it is so ordered.

Rainey, C. J., and Harrison, Kane, Pitchford, McNeill, and Ramsey, JJ., concur.

Higgins and Bailey, JJ., dissent.

UNITED STATES FIDELITY & GUARANTY CO. v. SALSER ET AL. (No. 9730.)

(Court of Civil Appeals of Texas. Galveston. June 17, 1920. Rehearing Denied Oct. 7, 1920.]

224 Southwestern Reporter, 557.

MASTER AND SERVANT — COMPENSATION DOES NOT DESCEND TO HEIRS.

Under the Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, art. 5246-1 to 5246-91), particularly in view of section 8, the heirs of a deceased employee previously awarded compensation for 100 weeks for injuries have no right to such compensation on the death of the employee not due to the injuries, before the term of compensation had expired.

(For other cases, see Master and Servant, Dec. Dig. § 393.)

Appeal from District Court, Trinity County; Ben H. Powell. Judge.

Suit by the United States Fidelity & Guaranty Company against Mrs. Nancy Salser and others, heirs at law of Oscar Salser, deceased, to set aside order and decree of the State Industrial Board awarding them an unpaid balance of compensation previously awarded decedent for injury in employment by the Trinity Lumber Company. From decree for defendants, plaintiff appeals. Reversed and rendered.

Hunt & Teagle, of Houston, for appellant.

Hayne Nelms and J. A. Platt, both of Groveton, for appellees.

PLEASANTS, C. J. This suit was brought by appellant against the appellees, heirs at law of Oscar Salser, deceased. to set aside an order and decree of the State Industrial Accident Board awarding to appellees the unpaid balance of compensation which had been theretofore awarded the

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deceased, Oscar Salser, for an injury received by him in the course of his employment by the Trinity Lumber Company; the appellant having been the insurer of said company under the provisions of the Texas Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246-1 to 5246-91).

The evidence shows that the deceased, Oscar Salser, was an employee of the Trinity Lumber Company, and in the course of his employment received an injury which caused the loss of one of his eyes. The appellant was the insurer of said lumber company under the provisions of the Texas Workmen's Compensation Act, and as such insurer was liable to the deceased for the compensation due him under said act for his said injury. In recognition of this liability appellant entered into an agreement with the deceased to pay him $8.65 per week for 100 weeks beginning on October 8, 1917. which agreement was filed with and approved by the State Industrial Accident Board. The appellant complied with this agreement and made said weekly payments until the death of said Oscar Salser, which occurred on February 23, 1918, since which time it has refused to make any further payments.

The death of Oscar Salser was not the result of the injury received by him in the course of his employment, but was caused by disease contracted some time after the injury was received.

On April 7, 1919, the Industrial Accident Board, acting upon the claim and application of appellees, the mother, brother, and sisters of Oscar Salser, ordered and decreed that appellant pay to appellees the unpaid balance of the compensation theretofore awarded to said Oscar Salser.

The appellee, Mrs. Nancy Salser was dependent upon her son Oscar for support at the time of his death, and is now without means of support.

The trial in the court below without a jury resulted in a judgment in favor of appellees for the unpaid balance of the compensation awarded Oscar Salser and now claimed by the appellees, amounting to the sum of $683.35, one-half of said sum being adjudged to the mother, and the remaining one-half to the brother and sisters. It was further adjudged that said sum be paid by appellant in weekly installments of $8.65 in accordance with the award made by the Industrial Accident Board, and that appellees recover of appellant said weekly installments from February 23, 1918, up to the date of said judgment with 6 per cent. interest thereon from dates said installments became due.

Under appropriate assignments of error appellant assails the judgment on the ground that the right of Oscar Salser to the compensation for his injury awarded him by the Industrial Accident Board under the provisions of the Texas Workmen's Compensation Act did not upon his death descend and vest in his heirs, but terminated with his death, and appellees are not entitled to recover the unpaid balance of such awarded compensation.

While the question presented is not wholly free from doubt, we have reached the conclusion that appellant's contention should be sustained.

The clearly expressed intention of the Legislature in the passage of our Workmen's Compensation Act was to provide compensation to employees for injuries received by them in the course of their employment and to dependents of employees who should die as the result of injuries so received. There is nothing in the act which preserves in an heir of an employee the right to compensation due the employee for injuries received by him, and the beneficiaries named in the act are only given the right to compensation when the employee dies as a result of his injuries. The only right given by the act to heirs or beneficiaries of an injured employee is given by section 8, which reads as follows:

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"If death should result from the injury, the association hereinafter created shall pay the legal beneficiaries of the deceased employee a weekly payment equal to 60 per cent. of his average weekly wages," etc. Acts 35th Legislature, p. 273.

The compensation provided for the injured employee is for his benefit and protection, and if the employee dies before receiving any of such compensation, his death not being caused by the injury, no right thereto survives to his heirs. The agreement of appellant to pay the compensation awarded Oscar Salser by the Industrial Accident Board in accordance with the terms of said award did not change the nature of the right to the compensation, and appellees' claim is not founded upon a vested contract right of their decedent, but their cause of action is dependent upon whether the statute which provides compensation for an injured employee gives to the employee a vested right which would pass by will or inheritance. We do not think the statute should be so construed. Re Murphy, 224 Mass. 592, 113 N. E. 283; Re Bartoni, 225 Mass. 349, 114 N. E. 663, L. R. A. 1917E, 765.

In the Murphy Case, supra, the Supreme Court of Massachusetts, in passing upon the question of whether an award made under the Compensation Act of that state to a dependent of an employee who died as the result of injuries received in the course of his employment, says:

"To hold that dependent's right to compensation is a vested right, which passes to a legatee by will and in case of intestacy goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go in that case to persons altogether outside the class contemplated by the act. So construed, the act would or might enrich strangers in place of doing justice to the family and next of kin of an employee killed in the course of and so as an incident to the business in which he was employed."

In the Bartoni Case, supra, the Supreme Court of that state said:

"The right to the weekly award was not vested absolutely in the widow, but continued only during her life. The right to compensation on her account ceased with her death."

In our opinion it would do violence to the purpose of our act, and place a burden upon the insurer not intended by the act, to hold that the right to the compensation therein provided for the benefit of the injured employee upon the death of the employee passes to heirs regardless of whether his death was caused by his injury and regardless of whether the heirs are dependents of the deceased, and unless our act be so construed appellees' claim in this suit cannot be sustained.

It follows from these conclusions that the judgment of the court below should be reversed, and judgment here rendered for appellant; and it has been so ordered.

Reversed and rendered.

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GATES v. A. G. DEWEY CO. ET AL. (No. 230.)

(Supreme Court of Vermont. Oct. 5, 1920.)

111 Atlantic Reporter, 446.

1. MASTER AND SERVANT—TRANSCRIPT NOT BROUGHT UP BY REFERENCE TO TESTIMONY IN APPEAL.

Reference in the appeal of the employer and insurer to the testimony taken by the Commissioner of Industries in proceedings under the Workmen's Compensation Act, making transcript thereof a part of the appeal, does not bring the transcript before the Supreme Court.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

2. MASTER AND SERVANT — FINDING FOR AWARD UNDER COMPENSATION ACT NOT REVIEWABLE, IN ABSENCE OF TRANSCRIPT.

Where the transcript of evidence before the Commissioner of Industries is not before the Supreme Court on the appeal of the employer and insurer, the court cannot say that the commissioner's finding that the employee was injured in his employment, to which the employer and insurer object, was not warranted by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

3. MASTER AND SERVANT — FINDING OF DEPENDENCY OF COMPENSATION CLAIMANT, LIVING APART FROM HUSBAND FOR CAUSE, JUSTIFIED; "DEPENDENT."

In a widow's proceeding for compensation for death of her husband under the Workmen's Compensation Act, evidence *held* to justify findings of the Commissioner of Industries that at the time of the accident claimant widow was living apart from her husband for justifiable cause, and was a dependent within the meaning of the statute (G. L. 5778), showing that the husband, after being allowed to leave an insane asylum, had gone to reside some distance from the wife, etc.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from Order of Commissioner of Industries.

Proceedings under the Workmen's Compensation Act for compensation for death of William E. Gates, by Margie Gates, against the A. G. Dewey Company, the employer, and the Employers' Liability Corporation, the insurer, wherein compensation was awarded by the Commissioner of Industries, and the employer and insurer appeal. Award affirmed.

Argued before Watson, C. J., and Powers, Taylor, Miles, and Slack, JJ.

Erwin M. Harvey, of Montpelier, for appellants.

Roland E. Stevens, of White River Junction, for appellee.

WATSON, C. J. [1] In defendants' appeal, reference is made to the testimony taken by the commissioner, making a transcript thereof a part of the appeal. But this does not bring the transcript before us. A similar holding has been had so many times that citation of authority is unnecessary. The case is therefore before this court solely on questions of law arising on the facts found and certified up by the commissioner.

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Defendants assign two reasons why compensation should be denied: (1) The accident did not arise out of and in the course of the employment; (2) the wife, at the time of the accident, was living apart from her husband, and justifiable cause is not shown.

The record shows that William E. Gates, the deceased, was in the employ of the deftndant A. G. Dewey Company when he received injuries at the plant of the company on January 22, 1919, resulting in his death two days later; that he left surviving a widow, the claimant, Margie Gates, but, so far as shown. he left no other dependents.

It appeared that deceased was employed in tending a flocks cutting machine which was driven by a belt from a shafting near the ceiling; that his duties did not ordinarily require him to do anything with the belt. There was evidence tending to show that he had been forbidden to meddle with the belt, but it appeared that he might at times have been required to assist the foreman in changing it. The accident occurred in the room of his employment, in the morning soon after the hour for commencing work. It appeared that the power had been started. that the belt was dangling from the revolving shafting and that he was caught in a loop which had formed in the belt and drawn around the shafting, receiving the injuries from which he died. He was 64 years old, slow, and rather feeble. The superintendent of the company testified that the deceased could not have put the belt on alone, and the witness thought deceased knew he could not do so, and that he was not attempting it when injured. Hearsay evidence was introduced, apparently without objection, tending to show that deceased mounted a stepladder, reached up his hand to take hold of the belt, with the evident intention of straightening out the loop which had formed, when his arm was caught in the loop and the injury resulted. The commissioner states that if this evidence be disregarded, he thinks it a fair inference from the evidence in the case that deceased was injured while attempting to do something which he conceived to be in the line of his duty, and essential for him to do in the service of his employer. The commissioner, therefore, found that the deceased met his death from personal injury received by accident arising out of and in the course of his employment.

[2] Defendants say that hearsay evidence was also introduced on this question by them; that the record clearly shows that the commissioner could not find the essential fact last stated without disregarding evidence which had been admitted in the case, and that to disregard evidence, whether hearsay or otherwise, was error. But this hardly seems to be a fair construction of the record. On the contrary, the manifest meaning is that, whether that hearsay evidence be considered or not, he makes the finding immediately following. The transcript not being before us, we cannot say that the finding to which objection is made was not warranted by the evidence, and so error does not appear.

[3] II. It is contended that the claimant should not be awarded compensation, other than the burial expenses, because, at the time of the accident, she was not living apart from her husband for a justifiable cause. She married the deceased in February, 1888. They lived together as husband and wife until about September 20, 1912, when the husband was committed to an insane asylum at Worcester, Mass. Thenceforth the wife never lived with him, and was not actually dependent upon him, but supported herself and in fact contributed to some extent to his maintenance during the period of his confinement. Prior to the husband's being thus confined, he had used considerable violence toward his wife, and on one or more occasions had threatened her life. For a time she visited him occasionally at the asylum; but, as such visits seemed to excite him and arouse his animosity toward her, the hospital authorties advised her that it would be better to discontinue them. In the spring of

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1917 he was perrmitted to leave the institution and go to Maine, he being given to understand that, if he remained away a year without its being necessary to return him to the institution, he would be automatically discharged therefrom. That period had not expired at the time of his death, and he was never actually discharged from the institution. The last time the wife heard from him, some seven months before his death, he requested that his gun, axe, and jackknife be sent him; but upon advice of the hospital authorities she declined to send them. The findings state that this request, and the advice received from the hospital, would naturally suggest to her that her husband might again become possessed of ideas of violence, and in view of the antipathy he had formerly shown toward her and of other facts in the case, the commissioner did not think it was her duty to travel a long distance and attempt to resume living with him, certainly not until he had indicated a desire to have her do so. The finding was therefore made that at the time of the accident, the claimant was living apart from her husband for justifiable cause, and was a dependent within the meaning of the statute. G. L. 5778. Considering the evidence shown by the record, including inferences which may properly be drawn from other facts found, it cannot be said that these findings were not justified.

This disposes of all the questions presented for review.

The award is affirmed with costs. Let the result be certified to the commissioner of industries.

POCCARDI, ROYAL CONSUL, ETC., v. OTT, STATE COMPENSATION COMMISSIONER. (No. 4062.)

(Supreme Court of Appeals of West Virginia. Sept. 7, 1920.)

104 Southeastern Reporter, 54.

(Syllabus by the Court.)

1. MASTER AND SERVANT—COMPENSATION PAYMENTS ACCRUING BEFORE BENEFICIARY'S DEATH RECEIVABLE BY REPRESENTATIVE.

Upon the death of a beneficiary, to whom an award has been made pursuant to the provisions of clause (c), section 33, chapter 15P, Code 1918 (Code Supp. 1918, sec. 689), accruing and payable in periodic installments, the lawful representative of his or her estate may claim and receive such portion thereof as had accrued and remained unpaid at the date of the beneficiary's death.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2 MASTER AND SERVANT—ESTATE OF DECEASED NONRESIDENT ALIEN BENEFICIARY, AWARDED COMPENSATION, MAY BE REPRESENTED BY CONSUL IN COLLECTION.

Pursuant to the general authority conferred by section 39, chapter 15P, Code 1918 (Code Supp. 1918, sec. 695), as amended by section 39, chapter 131, Acts 1919, the executor or administrator of the estate of a deceased nonresident alien beneficiary may be officially represented, in the collection of such accrued and unpaid installments, by the consular officer of the country of which such beneficiary was a citizen or subject.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

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From an order of Lee Ott, State Compensation Commissioner, directing the return of a check drawn and mailed by him to the widow and beneficiary to Vito Orazio Gasparro, an Italian, killed in the state in the course of his employment, within Workmen's Compensation Act, Gaetano Poccardi, Royal Consul, appeals on behalf of the widow's heirs, executors, and assigns. Payment of claim allowed.

Joseph W. Henderson, of Philadelphia, Pa., for petitioner.
E. T. England, Atty. Gen., and Frank Lively, Asst. Atty. Gen., for respondent.

LYNCH, J. Complaining of an order of the state Compensation Commissioner directing the return of a check for $244.19, theretofore drawn and mailed by him, in ignorance of her death, to the widow and beneficiary of Vito Orazio Gasparro, an Italian, killed in this state in the course of employment within the scope of the Workmen's Compensation Act, Gaetano Poccardi, Royal Consul, prosecutes this appeal "on behalf of the heirs, executors, and assigns" of said widow. The case presents the question of the status of a compensation award upon the death of the beneficiary.

Vito Gasparro died on April 16, 1917 from fatal injuries received in a coal mine in this state. He left two dependents, found by the commissioner to be entitled to compensation, his widow and one son, both of whom resided in Italy. The son died December 26, 1917, and the widow August 30, 1918. The compensation awarded to the former was paid to the date of his death. The check involved in this inquiry covered compensation payable to the widow for the period from August, 1917, to June 30, 1918, and which, therefore, had accrued at the time of her death, though the check was not mailed for several months thereafter and in ignorance of her demise. Upon learning the facts, respondent directed that the check be returned to him, and likewise declined to pay the compensation due for the period from June 30, 1918, to the date of her death. To review such ruling this appeal is prosecuted.

[1] We are not concerned here with the question whether a compensation award survives upon the death of the beneficiary or ceases with it. That is a matter dependent upon the provisions of the compensation statutes of the several jurisdictions. In England and Ohio, perhaps also in other states, the rule is that an award to a wholly dependent person, for a stated period, vests in the dependent from the date thereof, and constitutes a right transmissible as property, and upon the death of such dependent, before the expiration of the period of the award, his or her personal representative is entitled to the balance thereof, if any, remaining unpaid. United Collieries, Ltd., v. Simpson, [1909] A. C. 383; State ex rel. Munding v. Industrial Commission of Ohio, 92 Ohio St. 434, 111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162, and note 13 N. C. C. A. 713. But in this state the statute is clear and explicit as to the termination of the right to a compensation award. Clause (c), § 33, c. 15P, Code 1918, provides:

"If the deceased employee leave a widow or invalid widower, the payment shall be twenty dollars per month until the death or remarriage of such widow or widower."

The amendment of 1919, clause (d), section 33, c. 131, Acts 1919, makes no change in this respect. Hence there can be no question that the death of the widow of Vito Gasparro terminated all her right, as well as that of her estate, in and to the compensation fund of this state, so far as payments accruing after her death are concerned; and as to them petitioner makes no claim. Murphy's Case, 224 Mass. 592, 113 N. E. 283; Matecny v. Vierling Steel Works, 187 Ill. App. 448; 1 Honnold on Workmen's Compensation p. 252, § 79.

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But petitioner insists that he is entitled, on behalf of the estate of the deceased beneficiary, to receive such compensation awards as had accrued, but remained unpaid, at the date of her death. This contention by her personal representative. Similarly his contention of money already sioners' award, the widow of the deceased workman was entitled to receive $20 per month until her death or remarriage. This money, as it accrued periodically, belonged to the widow as much as if it actually had been paid over to her or deposited to her credit in a bank. The only effect of her death was to cause cessation of the accrual of the installments. The money was hers, held by the commissioner for her benefit. If he had paid before her death the installments already due her, it is clear he would have had no right after her death to claim a refund thereof, for it would have constituted part of her estate, to be administered by her persnal representative. Similarly his contention of money already due her until after her death cannot increase or enlarge his right in that respect. Therefore those lawfully representing her estate are entitled to such sum as has accrued during the period from the last payment to the date of her death. Section 42, c. 15P, Code 1918 (Code 1913, sec. 698), as amended by section 42, c. 131, Acts 1919, contains nothing requiring a different disposition of such fund.

[2] Respondent insists, however, that petitioner does not allege or show that he is authorized to act as executor or administrator of the estate of the deceased widow, and that payment to him would be no defense to a later suit by a lawfully appointed personal representative. Section 39, c. 15P, Code 1918, as amended by section 39, c. 131, Acts 1919, provides:

„"Non-resident aliens may be officially represented by the consular officers of the country of which such aliens may be citizens or subjects: Provided, that nothing herein contained shall be construed as giving such consular officer the right to make application for compensation in behalf of non-resident aliens."

Respondent contends that this section confers authority upon petitioner to represent only nonresident alien dependents of deceased workmen and not their heirs or personal representativies, and that since the dependents of Vito Gasparro are dead, petitioner possesses no authority to represent their estates. The language of the sectioin, however, is not so limited, and seems to embrace all nonresident aliens, which would include the lawfully appointed personal representative or representatives of the widow s estate. The only limitation or restriction placed upon the representative authority of the consular agent is that contained in the proviso, which apparently is directed only to original applications for compensation. In this case, however, the original application for compensation was made at a time prior to the enactment of the proviso, and under the broad authority conferred by the preceding portion of the statute. In due time the award was made, and payments made or proffered thereunder. The check now in dispute covered all the installments due the widow, except those for the last two months of her life. It was mailed pursuant to the award previously granted, though after her death, and in ignorance of it.

Petitioner's present action relates to a claim already due and allowed, but unpaid in part, and clearly does not fall within the scope of the proviso, whatever may be the effect of the latter upon original applications. Therefore, petitioner being authorized by the statute to act in behalf of nonresident aliens in general, including representatives of the widow's estate, any payment made by the commissioner for delivery through petitioner to the persons entitled thereto according to the statutes of Italy could be pleaded in defense of an action subsequently instituted by the personal representative, here or elsewhere. Consequently there

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could not, in any aspect of the case, be any danger of the complications relied on by the compensation commissioner. The receipt of the consul of Italy will afford him all the protection he may legally need, demand, or require; and should the consul fail or neglect to account properly for the amount so paid and received, he and he only would be liable to the person or persons whom he thus represents.

For the foregoing reasons, we are of opinion that the commissioner was in error in refusing payment of the amount covered by the check in question, and further in declining to pay such additional installments as had accrued prior to the death of the dependent widow, and direct certification of our decision to him.

HACKLEY-PHELPS-BONNELL CO. ET AL. v. INDUSTRIAL COMMISSION ET AL.

(Supreme Court of Wisconsin. Oct. 19, 1920.)

179 Northwestern Reporter, 590.

1. MASTER AND SERVANT — COMPENSATION AWARD NOT PREVENTED BY PREDISPOSITION TO DISEASE.

Predisposition to disease does not prevent an award under the Workmen's Compensation Act, when the disability is proximately caused by the accident.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

2. MASTER AND SERVANT—EVIDENCE HELD TO SHOW INJURIES TO COMPENSATION CLAIMANT.

In proceedings under Workmen's Compensation Act, where the employer claimed that employee's account of the injury that he had slipped on ice and struck his arm against a stump, so that slivers had penetrated into the arm, was so improbable as to be unworthy of belief evidence *held* to justify a finding in employee's favor.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3 MASTER AND SERVANT—SUPREME COURT BOUND BY INDUSTRIAL COMMISSION'S FINDINGS OF FACT JUSTIFYING COMPENSATION.

On appeal from an order affirming an award under the Workmen's Compensation Act, the Supreme Court will not substitute its opinion on a question of fact from a reading of the record for that of the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].]

4. MASTER AND SERVANT—REVIEW ALLOWABLE BY COMPENSATION ACT.

A party charging fraud in an award in the record on review by the circuit court under the Workmen's Compensation Act St. 1919, § 2394-19, has an ample remedy by offering proof of such charges, and may also show, if such be the fact, that a document in the record purporting to be a finding and award of the Industrial Commission was not in fact its act.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

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5. MASTER AND SERVANT — COMPENSATION AWARD PRESUMED REGULAR.

In an action under Workmen's Compensation Act (St. 1919, § 2394-19), to review and set aside an award of the Industrial Commission, the award will be presumed to have been regularly made.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

6. MASTER AND SERVANT—FINDINGS AND AWARD UNDER COMPENSATION ACT NEED NOT RECITE DETAILS OF PROCEDURE.

Findings of fact and award under the Workmen's Compensation Act, reciting that the findings and award are made by the Industrial Commission are sufficient, and it is not necessary to recite the details of commission's procedure, whereby it finds the facts and makes the award, nor to recite more explicitly than that the commission acts—that it has complied with the law as to the manner of meeting.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceedings under Workmen's Compensation Law (St. 1919, §§ 2394-1 to 2394-32) for compensation for injuries by John Cooley opposed by the Hackley-Phelps-Bonnell Company, employer, and Wisconsin Employers' Exchange, insurer. An award by the Industrial Commission in favor of the applicant was affirmed by circuit court on review, and the employer and insurer appeal. Affirmed.

Applicant John Cooley was engaged to perform services for appellant company. On the second day of such services, March 19, 1918, he was working, pursuant to instructions, upon a railroad track in the woods. There was snow and ice on the ground. Applicant testified before the Industrial Commission that the day was bright and warm and he had rolled up his sleeves. That he was directed to get some blocks with which to level the track, and for this purpose went apart from his fellow workers, cut a pole, and was returning with it on his shoulder when he slipped on some ice and fell, striking his left arm against a stump; that he continued his work the rest of the day, and said nothing about the matter to other workers. The next day he felt sick, and his arm pained him. He did not work, and on the day following was discharged and left the neighborhood. That his arm got worse, and thereafter he found and pulled out of his arm two long slivers, which had penetrated deeply into it. The arm continued to grow worse, and shortly thereafter he received medical and hospital attention. Amputation resulted.

The commission held three hearings at intervals of several months. Applicant testified at each of these hearings.

There was testimony of the hospital matron and another that when applicant came to the hospital there were two marks upon his arm, near the seat of infection, where the skin was broken, and which looked as though something might have been pulled out there.

There was testimony on behalf of the appellant by fellow employees of the company and the keepers of a boarding house at which applicant lived at times that his left hand was swollen and discolored before the alleged accident, and that no one had heard of or knew of the alleged accident. Applicant testified that his hand had been calloused, but was otherwise in good condition, and this was corroborated by the testimony of persons at the hospital.

Upon the evidence presented the commission found that the applicant and respondent were subject to the provisions of the Workmen's Com-

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pensation Act on March 19, 1918, when applicant sustained an injury growing out of and incidetal to the employment which was proximately caused by accident and not intentionally self-inflicted.

The finding stated that, although applicant had not given notice in writing of his claim for compensation within 30 days following the injury, such failure was not with the intention of misleading respondent, and did not mislead; that respondent had actual notice of the claim within 30 days.

The findings stated the nature of the injury, the time during which applicant was disabled, the length of time for which he was entitled to receive compensation for permanent injury, the amounts to be paid for medical and hospital attendance. The award followed the finding, and was signed by all the commissioners.

Action was brought by appellant company to review and set aside said findings and award on the grounds: First, that the commission acted without and in excess of its powers in making all of said findings, and that the findings were not supported by the evidence; and, second, that the commission as such did not act upon the matter, that the award is in fact not the award of the Industrial Commission of Wisconsin acting as such, but that the action was determined by an examiner of the commission, and that the award was that of said examiner. The circuit court affirmed the award, and from its order so doing this appeal was taken.

Otjen & Otjen, of Milwaukee, for appellants.

J. J. Blaine, Atty. Gen., W. W. Gilman, Asst. Atty. Gen., and F. F. Wheeler, of Oshkosh, for respondents.

JONES, J. (after stating the facts as above). 1. Counsel for the appellants admit that if the testimony of the applicant Cooley is worthy of belief there is evidence to support the findings of the commission. Their contention is that his testimony is so improbable as to be unworthy of belief. It may be granted that the account of the injury given by him seems rather improbable in some particulars. Yet the applicant, apparently a man of no particular intelligence or education, told substantially the same story as to the principal facts, both to his medical attendants a few days after the alleged accident and at three hearings of the commission at intervals of several months. Some of the most important statements were corroborated by the testimony of the hospital matron and others.

[1] The testimony introduced by appellants tended to show that Cooley had been troubled by his left hand for years, and that it looked as though it had been frozen. This was controverted, but if conceded to be true it does not necessarily refute the claim that the loss of the arm was nevertheless the result of the accident as alleged. As stated by the circuit judge, predisposition to disease does not prevent an award when the disability is proximately caused by the accident in question.

[2, 3] With the evidence in this condition the commission was entirely justified in reaching the findings they did. They had the opportunity of observing the witnesses, their conduct and demeanor, and it is their function, as it should be as triers of the facts, to judge of the credibility of witnesses and the weight of their testimony. We should be exceeding our function were we to substitute our opinion from a reading of the record for that of the commission. The rule is well established by the statute and numerous decisions of this court. Milwaukee v. Industrial Commission, 160 Wis. 238, 244, 151 N. W. 247; Hoenig v. Industrial Commission, 159 Wis. 646,150 N. W. 996, L. R. A. 1916A, 339; Milwaukee Coke & Gas Co. v. Industrial Commission, 160 Wis. 247, 151 N. W. 245; William Rahr Sons Co. v. Industrial Commission, 166 Wis. 28, 163 N. W. 169; Wausau Lumber Co. v. Industrial Commsson, 166 Wis. 204, 164 N. W. 836.

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2. Appellants' counsel further contend that the award is not the award of the Industrial Commission of Wisconsin, but in fact is the award simply of an examiner of the commission. Counsel state in their brief that they have information that the award was not made by the commission acting as a body, that the record was prepared by an examiner of the commission, and submitted to the commissioners individually and approved by them separately. They state that under the provisions of section 2394-19 of the statutes there is no remedy whatever for the review of the action of the commission except by suit started in the Dane county circuit court; that the review thus provided for is merely a review of the record, and is not a trial de novo; and that there is no opportunity to present additional facts showing the absence of official action by the commission. Because of this inability which they claim exists, it is contended that the commisson should show upon the face of the record compliance with all jurisdictional requirements; that it met and acted as a commission; and that a record which does not show these facts is defective and should be set aside.

It is not necessary in this opinion to recite at length the provisions of the statute. It is provided that the findings of fact by the commission acting within its powers, in the absence of fraud, shall be conclusive; that an action may be brought for review; that the pleadings, all the testimony and documents and papers taken and filed before the commission, and its orders, findings. and award shall be filed with the clerk of the circuit court and constitute the record in that court; that such return "of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in section 2898 of the statutes, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action." It is further provided that—

The court may set aside the order, award, or judgment "only upon the following grounds:

"(1) That the commission acted without or in excess of its powers.

"(2) That the order or award was procured by fraud.

"(3) That the findings of fact by the commission do not support the order or award."

[4] It would be indeed surprising if a party had no opportunity to show, if such be the fact, that a document in the record purporting to be the findings and award of the commission was in fact not the act of the commission. We are not convinced that this assumption is correct. If the charges of counsel amount to allegations of fraud there was an ample remedy by offering proof of the facts alleged. International Harvester Co. v. Industrial Commission, 157 Wis. 167, 172, 147 N. W. 53, Ann. Cas. 1916B, 330. Appellants' counsel made no attempt in the circuit court to attack the jurisdiction of the commission or to show that it acted beyond its powers in the mode of making the award, or that the award was procured by fraud. The allegations of the complaint and the assertions in the brief, which are said to be based on "information" and "understanding," are relied on to convince this court that the award is not in fact the award of the commission.

[5] Because our decision is based on another ground it is not necessary to decide whether the appellant could have properly offered proof that the commission had not acquired jurisdiction or had lost it by handing down and recording findings and an award made up in the manner alleged. Nor is it necessary to decide whether a direct attack by another form of action would be a proper remedy. We base our decision on this point on the well-settled rule in favor of the presumption of regularity of official acts.

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In this state the rule has been applied to the acts of inspectors of election where the statute required that the ballots should be preserved and disposed of in a certain manner (State ex rel, Anderson v. Rempf, 69 Wis. 471, 34 N. W. 226, 2 Am. St. Rep. 753); to the acts of a board of education (American F. & F. Co. v. Board of Education, 131 Wis., 220, 224, 110 N. W. 403); to the acts of a board of public works (Wright v. Forrestal, 65 Wis. 341, 350, 27 N. W. 52); to the acts of a joint school district board (Dolan v. Joint School District, 80 Wis. 155, 157, 49 N. W. 960).

[6] The recitals in the findings of fact and award are that the commission makes the findings of fact, and that the commission awards. These documents are signed by the commissioners in the name of the commission. The Industrial Commission has been created a body of broad powers and great responsibility, and it is not necessary that it should recite the details of its procedure whereby it finds the facts and makes the awards, nor that it should recite more explicitly than that the commission acts—that it has complied with the law as to the manner of meeting for making its decisions. During the nine years of the existence of the commission it has decided many hundreds of cases. Those decisions have been acquiesced in by the public, and we cannot agree that the averments and arguments made in this case overturn the presumption as to the regularity of its acts.

Judgment affirmed.

Kerwin and Eschweiler, JJ., took no part.

HEIST v. WISCONSIN-MINNESOTA LIGHT & POWER CO.

(Supreme Court of Wisconsin. Oct. 19, 1920.)

179 Northwestern Reporter, 583.

MASTER AND SERVANT — WORKMAN HELD EMPLOYEE OF CORPORATION UNDER COMPENSATION ACT.

Where the superintendent of defendant power company instructed his wife to send somebody to remedy trouble on a line, though he mentioned one other than plaintiff's decedent in an advisory way, plaintiff's decedent, actually sent by the wife, was an employee of the company, having been employed by the superintendent through his wife, so that the company's liability for his death was measured by the Workmen's Compensation Act and action for the death by plaintiff administrator cannot be maintained.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Circuit Court, St. Croix County; George Thompson, Judge.

Action by George E. Heist, administrator of Erwin Heist, deceased, against the Wisconsin-Minnesota Light & Power Company, to recover damages for the benefit of decedent's father and mother, resulting from his death occasioned by his coming in contact with one of the electric wires of defendant's power lines. From judgment for plaintiff rendered on the verdict of the jury, defendant appeals. Judgment reversed, and cause remanded, with instructions to dismiss plaintiff's complaint.

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G. O. Linderman, of Eau Claire, and Spencer Haven, of Hudson, for appellant.

Laybourn & Cary and Geo. A. Lewis, all of Minneapolis, Minn. (C. J. Strang, of Grantsburg, of counsel), for respondent.

OWEN, J. The pivotal question is whether the deceased at the time of his death was an employee of the defendant company. The defendant is a power company with its principal plant for the generation of electric power located at the city of Glenwood. It furnished power for eleitric lights in the village of Boyceville. On the evening of August 23, 1918, the electric lights in the village of Boyceville were out. It was discovered that the wire carrying the current from Glenwood to Boyceville was broken. One Hill was the superintendent of the company, and had general management of its affairs at Glenwood. On the evening in question he was at Stillwater. During a telephone conversation with his wife, at about 8 o'clock, she advised him that there was trouble with the lights at Boyceville. He asked her if she could get hold of Norman Larson, who had been a former employee of the company, to go down. She said that he was out threshing. He asked her what had been done, and she said they took out the fuse and transformer. She did not know at that time that the line was down. He wanted her to get Larson or somebody to get that line fixed, the fuse and transformer, so that they would have lights at Boyceville. He testified:

"When I called her up she said something about there having been trouble on the Boyceville line, and that was when I spoke about Norman Larson, and she said that the transformer had already been fixed by Mr. Northrup, she thought, and I told her I would call her in an hour or so and find out if it had been fixed. I didn't tell her to do anything in the meantime. If other trouble would develop on the line I wanted my wife to get Norman Larson to fix it if he could, and if she couldn't get Norman Larson to get some one else to fix it right away."

Shortly after this conversation it was discovered that the wire was broken. Mrs. Hill was advised, and she called up the plaintiff, who is the father of deceased, and who had formerly been superintendent of the plant. She asked plaintiff if he could go out and fix the wire. He told her that he could not, but asked where Norman Larson was. Just at that time Norman Larson came into the store where plaintiff was, and he then said to Mrs. Hill, "Here is Norman Larson now, let him go." Then he glanced over his shoulder and saw Erwin, the deceased, and said, "Erwin is here, let Erwin go." After that talk with Mrs. Hill plaintiff requested Erwin to go out and fix the wire. Erwin, the deceased, and Norman Larson, together, went to fix the wire. Upon arriving at the place where the wire was broken, deceased took hold of one of the broken ends and was immediately killed.

If the deceased was an employee of the company this action cannot be maintained, because the defendant was under the Workmen's Compensation Act (Laws 1911, c. 50), and its liability in the premises was referable to the provisions of that act. The act (section 2394-8, Stats.) as it existed at the time of the accident, provided that any employee shall be deemed to have accepted and shall be subject to the provisions of the act if at the time of the accident upon which liability is claimed the employer charged with such liability is subject to the provisions of the act and the employee shall not have given to his employer notice in writing that he elects not to be subject to its provisions.

The learned circuit judge held that the deceased was not an employee of the company, because Hill's instructions to his wife were to get Norman Larson to fix it if she could get him, and that if she could not get Larson then to get some one else, and that, as Larson was available, Mrs.

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Hill had no authority to employ the deceased. We regard this as too literal and narrow a construction of the authority which Mr. Hill vested in his wife. It is plain to us that the authority conferred upon her by the telephone conversaton above set forth was to get some one to repair the trouble. His reference to Norman Larson was advisory merely and a suggestion which was intended to be helpful to his wife in the performance of a duty with which she was not very familiar. We have no doubt that the circumstances under which the deceased went to repair the wire constituted him an employee of the company, and that the liability of the company is measured by the terms of the Workmen's Compensation Act.

It follows that this action cannot be maintained.

Judgment reversed, and cause remanded, with instructions to dismiss the plaintiff's complaint.

Kerwin and Eschweiler, JJ., took no part.

MUELLER & SON CO. v. GOTHARD ET AL.

(Supreme Court of Wisconsin. Oct. 19, 1920.)

179 Northwestern Reporter, 576.

1. MASTER AND SERVANT — MINOR, THOUGH MISREPRESENTING AGE, ENTITLED TO TREBLE COMPENSATION.

An award of treble damages to a minor under the Workmen's Compensation Act should not be set aside because of his false representations as to age.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

2. MASTER AND SERVANT—PROVISION FOR TREBLE COMPENSATION TO MINOR CONSTITUTIONAL.

Laws 1917, c. 624, providing for treble compensation in cases where a minor of permit age is allowed to work without a permit, is constitutional.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceeding by John Gothard under the Workmen's Compensation Act to obtain compensnation for personal injuries, opposed by the Mueller & Son Company, the employer. An award of compensation was sustained by the circuit court, and the employer appeals. Affirmed.

Action to review an order of the Industrial Commission awarding under the Workmen's Compensation Act treble damages to a minor in the employ of plaintiff, said minor being of permit age, but employed without a permit. It appears that the minor falsely represented himself to be above the permit age and that the employer relied upon such representation in employing him.

Otjen & Otjen, of Milwaukee (E. A. Morse, of Antigo, of counsel), for appellant.

J. J. Blaine, Atty. Gen., W. W. Gilman, Asst. Atty. Gen., and Adolph Kanneberg, of Milwaukee, for respondents.

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VINJE, J. [1, 2] The claim that the award should be set aside because of the false representations of the minor as to his age is disposed of adversely to plaintiff by the ruling in Stetz v. F. Mayer Boot & Shoe Co., 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B, 675. A strong appeal and an able argument is presented to the court to overrule its decision in Brenner v. Heruben, 170 Wis. 565, 176 N. W. 228, holding that chapter 624, Laws of 1917, providing for treble compensation in cases where a minor of permit age is allowed to work without a permit, is constitutional. Counsel for plaintiff presented a brief as amici curiæ in that case, and made an oral argument therein. We have carefully considered the briefs filed in this case, and find that the arguments but supplement those made in the Brenner Case. A reconsideration of the subject-matter but confirms us in the view that the Brenner Case was correctly decided, and should be adhered to.

Judgment affirmed.

Kerwin and Eschweiler, JJ., took no part.

STATE v. INDUSTRIAL COMMISSION ET AL.

(Supreme Court of Wisconsin. Oct. 19, 1920.)

179 Northwestern Reporter, 579.

5. MASTER AND SERVANT—COURT WITHOUT JURISDICTION OF ATTORNEY GENERAL'S ACTION TO REVIEW COMPENSATION AWARD NOT TIMELY AUTHORIZED BY GOVERNOR.

Where, without direct authorization of the Governor, the Attorney General brought action in the circuit court to review an award of the Industrial Commission in a case in which the state was interested, and the Governor did not act to direct him to bring the action until more than 20 days from the date of the order or award, the time prescribed by the Workmen's Compensation Act, the circuit court was without jurisdiction of the action, despite the Governor's nunc pro tunc direction to the Attorney General, and motion to dismiss should be granted.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Action by the State of Wisconsin, by the Attorney General, against the Industrial Commission, to review its award. From judgment affirming the award, the State appeals. Judgment reversed, and cause remanded, with directions to dismiss the action.

J. J. Blaine, Atty. Gen., and W. W. Gilman, Asst. Atty. Gen., for the State.

David C. Pinkerton, of Oshkosh, and Byron H. Stebbins, of Madison, for respondent.

OWEN, J. The question that first presents itself is whether the court has jurisdiction of the action. The award of the Industrial Commission was made on the 14th day of June, 1919. This action was brought by the Attorney General June 20, 1919. It was brought on his own initiative,

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without authority from the Governor. On the 17th day of November, 1919, a motion to dismiss the action was made in the circuit court. On the 7th day of November, after notice of said motion to dismiss had been given, the Governor wrote the Attorney General a letter in which he assumed to ratify and confirm on behalf of the state the action on the part of the Attorney General in bringing the suit, and requested him, as of the date of the order and award of the Industrial Commission, to bring the action in the circuit court for Dane county, for the review of such order and award.

[1, 2] In this state the Attorney General has no common-law powers or duties. His duties spring from the statute, and he must find authority in the statute when he sues in the circuit court in the name of the state or in his official capacity. State v. Milwaukee E. R. & L. Co., 136 Wis. 179, 116 N. W. 900, 18 L. R. A. (N. S.) 672; State ex rel. Havel v. Sayle, 168 Wis. 159, 169 N. W. 310. Section 14.53, Stats., provides that—

The Attorney General shall "appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded by the Supreme Court to any circuit court in which the state is a party; and when requested by the Governor or either branch of the Legislature, appear for the state and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people thereof may be in any wise interested."

If he had any power or authority to bring the instant action, it was by virtue of the language just quoted. That it falls far short of conferring authority upon him to bring the action is apparent upon casual reading. He has no power to prosecute actions in the circuit court, except in cases remanded by the Supreme Court, unless requested by the Governor or either branch if the Legislature or in cases specifically authorized by the statute, such as section 3236, Stats.

[3, 4] Section 2394-22, Stats., provides that "in any action for the review of an order or award, and upon any appeal therein to the Supreme Court, it shall be the duty of the Attorney General, personally, or by a assistant, to appear on behalf of the commmission, whether any other party defendant shall have appeared or be represented in the action or not." This provision lays upon the Attorney General the duty to defend the awards of the Industrial Commission. No exception is made where the state is a party. Even though this provision contravened other general provisions elsewhere found in the statutes, by familiar rules of statutory construction this special provision, dealing with a particular subject, would prevail over such other general provisions. But this provision does not contravene any other provision in the statute specifying, generally, the duties of the Attorney General. His statutory duty, therefore, is to defend the awards of the Industrial Commission, and the Governor cannot, if he would, impose upon him duties in conflict therewith. Furthermore, there is a very practical reason why the Attorney General should consistently defend the Industrial Commission. If he is to defend the actions of the Industrial Commission as a general proposition and assail them when the state is adversely interested, he may easily find himself embarrassed by being forced into inconsistent positions. That very situation would arise if this case and Holt Lumber Co. v. Industral Commission, 168 Wis. 381, 170 N. W. 366, were concurrently pending, as, upon the merits, this case is ruled by that, as was held by the lower court. If they were pending at the same time, every argument made by the Attorney General in this case would tend to impeach the action of the Industrial Commission in that, and every effort made by him to sustain the action of the commission in that case would be against the position he

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seeks to maintain in this. Such a situation would be embarrassing to the Attorney General and detract from the value of his services to the commission. In the interest of good administration. if for no other reason, it should be avoided.

Furthermore, we may be permitted to suggest, for the consideration of the administrative and executive officers of the state. whether the spirit of the Workmen's Compensation Act (Laws 1911, c. 50) does not suggest acquiescence on the part of the state as a general policy, at least, in the decisions of the Industrial Commission upon questions affecting the duty of the state toward its injured employees. The state has set up this commission for the administration of the act, giving it dignity by conferrng upon it broad powers and limtting the right of judicial review of its acts within an exceedingly narrow scope. It has put the prestige and force of the state back of its orders and awards, by providing that in every action brought to review its awards it should be defended by the Attorney General of the state. Notwithstanding the Attorney General is commonly regarded as the principal law officer of the state, the Legislature provided in plain and deliberate language that he should defend the Industrial Commission in any action brought to review its awards, without making an exception in case of an action brought for that purpose by the state, or makng other provision for representation in the proceeding. That such provision was deliberate may well be believed when we consider the finality attaching to the decisions of the commission. Of necessity, the duty of the state must be determined by some state officer or agency. What better agency can determine that duty than the commission itself, experts and specialists in such matters? When that duty has been declared by the commission, and the principal law officer of the state directed to defend it. its pronouncements, it seems to us, should be challenged by other state officers with considerable reluctance.

[5] A motion to dismiss the action was made in the circuit court, which motion was denied. on the authority of Hammond-Chandler Lumber Co. v. Industrial Commission, 163 Wis. 596, 158 N. W. 292. it being the opinion of the court that the want of authority on the part of the Attorney General was comparable to the defective manner of starting an action in which the summons was signed by attorneys not resident of the state. One complete answer to that position is that a competent attorney has not yet been authorized to represent the state in this action. The Attorney General is prevented by law from acting in opposition to the Industrial Commission and is wholly disqualified to bring or maintain this action. Furthermore, we think the situation here entirely different from the one considered in Hammond-Chandler Lumber Co. v. Industrial Commission, supra. In that case the party had made a bona fide effort to bring the action, but acted ineffectively because he caused the summons to be signed by attorneys who had no authority to do so. In the instant case the party is the state. In authorizing the commencement of this action it could act only through the Governor. The Governor did not act until November 7th. The action is required to be commenced within 20 days from the date of the order or award. Had he acted deficiently or ineffectively, the case might fall within the principle of the Hammond-Chandler Case. But he failed to act at all. His failure to act was the failure of the state to act. The action of the Attorney General was no more the action of the state than if any other unauthorized officer or employee had caused the bringing of the action. To permit the Governor to act nunc pro tunc, as was attempted, is to enlarge the time for bringing the action and to set aside a statute of limitations. The

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action not having been brought within the time prescribed by statute, the court is without jurisdiction, and the motion to dismiss the action made in the lower court should have been granted.

It should be said that this disposition of the case constitutes no reflection upon the Attorney General. His activity in the matter was due entirely to his usual commendable fidelity to the interests of the state, which in a very general way is his client, so to speak. In the practical administration of his office he becomes imbued with the thought that it is his duty at all times to protect the state and its interests, and that where there is seeming conflict the state has first claim upon his services. His error here was very natural, and we think commendable rather than otherwise.

Judgment reversed, and cause remanded, with directions to dismiss the action.

Kerwin and Eschweiler, JJ., took no part.

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Where epileptic employee fell into tank where employment required him to be and was drowned accident arose out of employment. Miller v. Bell. (Ind.) 315
Death of employee by lightning results from injury arising out of employment only in case employment is such as to expose him to danger from lightning more than danger of community in general. Thier v. Widdifield. (Mich.) 339
Where employee loading straw sought rest in shade of box car during leisure period and fell asleep and was fatally injured, injury did not arise out of employment. Weis Paper Mill Co. v. Indus. Comm. (Ill.) 307
Where there was no rule forbidding carrying matches, though smoking was forbidden, commission could find that injuries caused by matches carried by employee while in wash room arose out of employment. Steel Sales Corp. v. Industrial Comm. (Ill.) 303
Where employe, during interval in work was warming himself by fire on premises and was injured by explosion of dynamite cap thrown in to fire by fellow employe, injury arises out of employment. Willis v. State [illegible] (Okla.) 377
Where employee at work was struck in eye by apple thrown by fellow servant in horse play, injury arose out of employment. Leonbruno v. Champlain Silk Mills (N. Y.) 483
Where employee resenting assault by fellow worker struck another believed to be assailant, he in turn kicking claimant, injury arises out of employment. Verschleiser v. Joseph Stern Son, Inc. (N. Y.) 472
Carpenter, long subject to dizzy spells, who placed coffee on employer's stove for lunch and burned hand in dizzy spell held not injured in course of employment. Neubergr v. Third Ave. Ry. Co. (N. Y.) 485
Where employee patrolling streets at night, guarding stores for employer furnishing watchman servce, was struck by bullet shot by policeman pursuing burglar, injury did not arise out of employment. Heidemann v. Amer. District Telegraph Co. (N. Y.) 568
Where servant died from peritonitis following operation after slight injury death was not result of accidental injury in course of employment. Hoffman v. Pierce Arrow Motor Car Co. (N. Y.) 569
Injury to foreman when building collapsed from tornado as he was attempting to close windows, part of duty, held to have arisen out of and in the course of employment and not by act of God Reid v. Automatic Elec. Washer Co. (Iowa.) 662

§ 374. —— INJURY AS PROXIMATE CAUSE.

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§ 375. —— SCOPE OF EMPLOYMENT.

(1). In general.

Where farmer employe was given permission to get pair of heavy shoes before going to work but before going for shoes went to saloon and was killed by automobile in going thence to post office for own purposes, he was not acting within employment when killed. Gisner v. Dunlop (N. Y.) 80

Where machine operator after few days work went to similar machine of fellow operator sustained injury to hand in attempting to operate it, machine being unguarded, unlike his own. injury did not arise out of employment. Adams & Westlake Co. v. Indus Comm. (Ill.) 3

Where truck driver and deceased, both employes of teamster, in course of work used elevator to move goods, and deceased was killed thereby, he was in teamster's service under act. Colbourn v. Nichols. (Del.).....140

Where furniture driver instead of returning immediately after delivery, proceeded to another city where he becomes intoxicated, helper of driver who was under control of driver and who was killed on return trip was killed in course of employment. Hartford Acc. & Indem. Co. v. Durham. (Tex.) 395

Employee while at work may go to wash room for personal purposes and such acts will be considered incidental to employment and compensation awarded for accidental injury received there. Steel Sales Corp. v. Indus. Comm. (Ill.) 303

Injury to employe does not arise out of employment where he was set to work at one machine, then worked at another, and without employer's knowledge went to work at third, where he was injured. Henry v. Indus. Comm. (Ill.) 276

Where it was established custom of employees to go to windows for fresh air, employee killed by falling to pavement below met death in accident arising out of employment. Sparks Milling Co. v. Indus. Comm. (Ill.) 299

Where employee working on road left it to seek shelter from storm and was killed by lightning before reaching shelter, death was result of accident occurring in course of employment. State Road Comm. v. Indus. Comm. of Utah. (Utah) 404

Factory employee driver of truck injured in cranking own car to go for purchase of spark plugs for truck, held entitled to compensation. Martin v. Henry Card & Co. (N. Y.)..... 484

Where mine employee left regular place and went to other section of mine where no duty called him and there caused explosion of gas, death was not in course of employment. Kuca v. Lehigh Valley Coal Co. (Pa.) 499

Death of minor in open pit on fall of overhanging bank held result of accident arising out of employment though he had been ordered not to work under bank. Indus. Comm. v. Funk. (Colo.) 436

Where railroads maintaining parallel tracks over crossing each maintained flagman to keep people off tracks, death of one flagman while attempting to rescue child on tracks of other railroad did not arise out of employment. Priglise v. Fonda, J. & G. R. Co. (N. Y.)..... 487

Injuries to 11 year old boy employed in store, received while crossing street to get water for general use of employees, held to have arisen out of employment. McDonald v. Great Atlantic & Pacific Tea Co. (Conn.) .. 525

Where employee in ice cream store was directed by employer who had interest in adjoining saloon to go to police station in interest of customer arrested in saloon and broke leg when pushed by officer at station house, injury was not accidental injury arising out of employment. Sabatelli v. DeRobertis (N. Y.) 573

Where Contract of employment entitled waitress to ride free in employer's hotel bus when on personal errand during off hours and was so injured while returning to report for duty, injury did not arise in employment. Roth v. Adirondack Co. (N. Y.) 557

Where employer forbade weavers to fix looms and employed special man to do so and weaver was injured in placing substance on belt of loom, he was acting outside scope of employment. Yodakis v. Alexander Smith & Sons Carpet Co. (N. Y.) 571

Where employee during working hours stopped work, left place, went 100 yards away to another building of employer, lay down to sleep, and slept for three hours until accidentally killed, held that accident did not arise in course of employment. Colucci v. Edison Portland Cement Co. (N. J.) 550

Injury in voluntary act outside of employment, though for benefit of employer, is not injury suffered in course of employment—where superintendent directed safety engineer to assist in caring for company's influenza patients, engineer's services were not voluntary and accidental injuries suffered therein entitled engineer to compensation. Engels Copper Mining Co. v. Indust. Acc. Comm. (Cal.)..... 624

Operator who, without knowledge or permission of foreman or authority of employer, went to roof to make repairs and was so injured, held not injured in employment. Koza's Case. Appeal of Amer. Mut. Liability Ins. Co. (Mass.) 685

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(2). Injury received while going to or from work.

Generally injury suffered in coming to or returning from employer's premises does not arise out of employment within act—Held that injury to workman sustained while riding to place of work in conveyance furnished by employer, in which workman was not directed or required to ride does not arise out of employment. Nesbitt v. Twin City Forge & Foundry Co. (Minn.) 66

Where employee was killed by being thrown from automobile furnished by employer to transport employees to place of work, injuries arose out of employment. Domingues v. Pendola. (Cal.) 3

Where working day of employees in shipyard, to be reached only by boat, began and closed at yard, employee killed while being conveyed in boat chartered by employer at order and expense of government, after having completed week's work and received pay, did not die from injuries arising out of employment. Rausch v. Standard Shipbuilding Corp. (N. Y.) 92

Railway employe injured while crossing yards of another company on way to work, while crawling under car, although he had choice of several other routes, was not killed in course of employment. Maseffe v. Kansas City Terminal Ry. Co. (Kan.) 159

Injuries to employee of store when using elevator to leave during lunch hour to buy theatre tickets held to have arisen out of employment. White v. E. T. Slatterly Co. (Mass.) 323

Where street car employee was injured by car when riding home to dinner between hours of duty, injuries arise out of employment. Manchester St. Ry. v. Barrett. (U. S.) 421

Where workman was injured in attempting to board motortruck to return home after work, injuries did not arise out of employment. Diaz v. Warren Bros. Co. (Conn.) 517

Employment necessarily includes reasonable time and space before and after ceasing actual employment.—Injury to railroad employee received while leaving after day's work held one "arising out of and in course of employment." Wabash Ry. Co. v. Indus. Comm. (Ill.) 649

Where employee left place of employment during regular hours and was injured in returning, injury held not one occurring out of and incidental to employment. Fidel. & Cas. Co. of N. Y. v. Indus. Acc. Comm. of Cal. (Cal.) 640

§ 376. —— NATURE OF INJURY.

(1). In general.

(2). Disease in general

Where infection was accelerated by injury it is not answer to claim for compensation that disease or infection did not naturally and unavoidably result from injury. Finkleday v. Henry Heide, Inc. (N. Y.) 565

Fact that applicant for compensation for injury, consisting of rupture of blood vessel of brain, was predisposed because of disease to this form of attack, is immaterial. St. Clair v. A. H. Meyer Music House. (Mich.) 540

Where injuries to eye did not cause additional defect to sight, aready injured by disease, compensation for loss was improperly awarded. Perry County Coal Corp. v. Indus. Comm. (Ill.) 653

Predisposition to disease does not prevent award when disability is proximately caused by accident. Hackley-Phelps-Bonnell Co. v. Indus. Com. (Wis.) 724

§ 377. DEFENSES TO CLAIMS FOR COMPENSATION.

Employe who in darkness stepped into elevator well without due precaution was negligent, precluding recovery against owners and lessees by compensation insurer. Globe Indem. Co. v. Hook. (Cal.) 127

§ 378. —— IN GENERAL.

§ 379. —— MISREPRESENTATIONS BY EMPLOYEE IN OBTAINING EMPLOYMENT.

§ 380. —— WILLFUL MISCONDUCT OF EMPLOYEE IN GENERAL.

Employe of teamster, riding on boxes on freight elevator cannot, where elevator was safe and, had boxes been properly loaded, he would not have been injured, be deemed to have shown deliberate and reckless indifference to danger which would bar recovery. Colbourn v. Nichols. (Del.) 140

"Willful" is not necessarily fulfilled by voluntary and intentional omission but includes element of intractableness, headstrong disposition to act by rule of contradiction—Held that plaintiff, injured because of failure to replace guards from machine which he was cleaning, was not precluded by statute from recovery. Bersch v. Morris & Co. (Kan.) 156

"Reckless indifference to safety" means more than want of ordinary care and implies rash careless spirit, willingness to take chance. Farmers' Grain & Supply Co. of Minden v. Blanchard. (Neb.) 362

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§ 381. —— INTOXICATION.

Intoxication to be available as defense must have contributed to accident or disability — that employee, killed when truck in which he was riding overturned as result of driver's negligence, was intoxicated would be no defense in action for death under act. Hartford Acc. & Indem. Co. v. Durham. (Tex.) 395

§ 382. —— SATISFACTION OR RELEASE.

Settlement agreement of insurance carrier with dependent of deceased employee, that payment of certain amount per week in accordance with act should be made so long as required by act, not being based on consideration of forbearance to sue, but on mutual mistake that employee was injured while engaged in interstate commerce was within scope of act, was without consideration. Nelson v. London Guar. & Acc. Co. (Cal.) 6

Where it was conceded that plaintiff was entitled to payments received and only question was whether disability was total or not, plaintiff's acceptance of payments for some weeks did not, where he was assured it was no waiver of rights, amount to compromise and settlement, precluding common law remedy to which he was entitled because engaged in work of maritime nature. Gray v. New Orleans Dry Dock & Shipbuilding Co. (La.) 46

(B) COMPENSATION.

§ 383. ACCIDENT OR INSURANCE FUNDS, AND CONTRIBUTIONS THERETO.

Where insurer issues policy to insure employees of Nebraska corporation while at work on premises partly without state and retains premium money paid therefor, it is estopped to deny liability on plea that it did not insure against accidents not occurring within state. Venuto v. Carter Lake Club. (Neb.) 594

§ 384. AMOUNT AND COMPUTATION OF AWARD.

§ 385. —— DISABILITY BENEFITS

(1). In general.

In awarding compensation to injured employee, who worked, in week of 54 hours, five 10-hour days and 1 4-hour (Saturday), commission erred in determining that employee worked only 5½ days a week and that weekly wages must be determined by dividing wage by 5½ to find daily wage, and then by multiplying such average daily wage by 300 to find annual earnings and then dividing such sum by 52 in order to determine basis of average weekly wage Roskie v. Amsterdam Yarn Co. (N. Y.) 88

Compensation for injury is properly awarded from eleventh day after injury to date of first hearing before board, to continue during period of total incapacity. Barry's Case. (Mass.) 57

Where employment is continuous, average weekly wage may be computed by multiplying average daily wage by 300 and dividing by 52 but where intermittent, it is determined by dividing aggregate amount earned by the number of weeks including week in which no work was done. State Road Comm. v. Indus. Comm. of Utah. (Utah) 494

Where employee violates rule of commission or disobeys orders of attending physician or otherwise arbitrarily refuses to cooperate with those in attendance upon him, award should cover only such period of incapacity or disability as would ordinarily result from such injury. Varoukas v. Indus. Comm. of Utah (Utah.) 598

Employees, receiving tips, are entitled to have tips considered in determining amount of awards under act, provided employers contemplate that they receive such gratuities —— where truck driver delivering meat received tips without knowledge of employer, amount so received should not be considered in fixing amount of compensation in absence of evidence of custom to give such tips. Begendorf v. Swift & Co. (N. Y.) 560

(2). —— Injury to arm, hand, or finger.

(3). —— Injury to leg or foot

(4). —— Loss of arm, hand, or finger.

Where injury to employe caused loss of use of entire arm it is equivalent to loss of arm. Choctaw Portland Cement Co. v. Lamb. (Okla.) 207

(5). Total Disability.

That one is not common laborer, able to do exactly same particular kind of common labor he was doing when injured is not test of total disability. Leitz v. Labadie Ice Co. (Mich.) 691

(6). —— Loss of arm, hand, or finger.

(7). —— Loss of leg or foot.

Where loss of leg in fact results in partial incapacity, provision for compensation for loss of leg applies, but where loss results in total incapacity, servant is entitled to compensation for total incapacity. Saddlemire v. Amer. Bridge Co. (Conn.) 180

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Employee who accidentally fractured leg necessitating amputation of foot was entitled to compensation for total incapacity until foot was amputated and thereafter to statutory allowance for loss of foot. Curtis v. Hayes Wheel Co. (Mich.) 537

(8). Partial disability.

Where glove maker working at home had been so engaged for only five weeks and was new to work so that highest weekly wage earned was $3.60 and lowest was $.25, "full weekly wage" to be taken as basis for award was average wage of employee of same class and similar employment in same or neighboring place. Fox v. Bachner Bros. Co. Inc. (N. Y.) 371

Compensation of employee who suffered injury whereby left arm was paralyzed held governed by statutory provision for partial disability to work. Garr v. Wyatt Lumber Co. (La.) 532

(9). —— Loss of or injury to eye.

(10). —— Injury to arm hand, or finger.

Where earning capacity of boy of 15, partially impaired by injury to hand, did not amount to total loss of wage earning power he was properly awarded compensation for partial disability. Barry's Case. (Mass.) .. 57

(11). Permanent disability.

(11¼). Loss of or injury to eye.

Employee, who had previously lost left eye and was rendered totally and permanently blind by injury to right eye, held entitled to compensation for total, permanent incapacity. Fair v. Hartford Rubber Works (Conn.) 521

(11½). Loss of or injury to ear.

(12). —— Loss of arm, hand, or finger.

(13). —— Injury to arm, hand, or finger.

(14). —— Injury to leg or foot.

Loss of part of foot held not "Loss of foot" within act. McLean v. Amer. Ry. Express Co. (Me.) 681

(15). Temporary disability.

Where injured employee suffered injury to leg greater than loss of use of leg, disability since injury being total, held he was not limited to compensation as for loss of use of leg but to compensation on basis of temporary total disability. State v. Albert Lea Packing Co. Inc. (Minn.) 464

(16). Expenses of medical or surgical treatment and nursing.

(17). Deductions or set-offs, and duty of claimant to reduce loss.

Disobedience by minor of employer's order not to work in pit without causing overhanging bank to be caved off held violation of reasonable rule for safety of employees. Indus. Comm. v. Funk. (Colo.) 436

(18). —— Submission to surgical operation.

(19). Excessive award.

(20). Commutation of payments and award of gross sum.

That employer has in good faith made lump sum settlement which is illegal may be shown on petition to commission for lump sum settlement and considered in determining whether settlement should be authorized. International Coal & Mining Co. v. Indus. Comm. (Ill.) 278

Commission, when applied to for lump sum payment, must exercise its judgment and discretion as to best method of making compensation in light of all facts. Stephenson v. State Indus. Comm. of Okla. (Okla.) 711

Held that award of compensation for total incapacity for maximum period allowed, and in lump sum, will not be disturbed. Stephenson v. State Indus. Comm. of Okla. (Okla.) 711

In entering agreement to discharge employer from liability for permanent disability of employee upon payment of lump sum, parties are not at liberty to make settlement at variance with statutory terms; ascertainment of amounts payable periodically under law is prerequisite to contract for commutation—in approval of commutation of compensation, public has interest which it is duty of court to protect without regard to wishes of parties—act does not contemplate payment of large sums of money to improvident employees or dependents who may lose it and become charge of public, but requires employers to pay injured employees compensation in periodical payments—under act, in case of death or permanent disability, commutation of compensation is departure from general rule and should only be sanctioned upon statutory terms—commutation of compensation is dependent on extent of injury.—Authority to approve commutation of compensation has been committed under act but settlement should be submitted to commissioner for approval before court is asked to approve. Perry v. W. L. Huffman Automobile Co. (Neb.) 704

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Provisions of act as to payment are stated. Stephenson v. State Indus. Comm. of Oklahoma (Okla.) 711

§ 386. —— DEATH BENEFITS.

(1). In general.

Award in favor of dependent mother, brothers, and sisters of deceased servant aggregating more per month than was contributed by deceased to them, held authorized. State Indus. Comm. v Downer Steel Co. (N. Y.) 75

Maximum amount allowed in 1918 to dependents of deceased was $11 a week. State ex rel. Johnson Hardware Co. v. Dist. Court of Carver Co. (Minn.) 189

It was within discretion of commission, in fixing compensation for death of employee, to provide it should be continued in favor of partial dependents for 252 weeks. Uintah Power & Light Co. v. Indus. Comm. of Utah. (Utah.) 229

Where contributions for support of dependents have not been constant, determination of such amount rests in discretion of commission. Popst v. Indus. Acc. Comm. (Cal.) 643

(2). Deductions.

Where minor son paid his full earnings to parents who were partially dependent upon such earnings, held that, in ascertaining average yearly earnings and fixing degree of dependency, employer is not entitled to deduction for expense of minor's board and support. Slater v. Ismert-Hincke Milling Co. (Kan.) 104

(4). Commutation of payments and award of gross sum.

(5). Apportionment of payments.

If award is made to administrator, compensation is to be distributed pursuant to order of court appointing him. National Zinc Co. v. Ind. Comm. (Ill.) 21

§ 387. —— DOUBLE COMPENSATION.

One receiving distinct injury to right leg resulting in loss and injury to left leg resulting in total incapacity was entitled to compensation for each injury—Where, in consequence of amputation of one leg other became infected and its use is lost, compensation may be had for loss of both legs and modification of original award for loss of leg amputated is authorized. Saddlemire v. American Bridge Co. (Conn.) 130

Commission has no power to award compensation for disfigurement to member and also for loss of use thereof — Award for disfigurement of hands and face does not preclude award for loss of eyes and arms. International Coal & Mining Co. v. Indus. Comm. (Ill.) 273

Employee may recover for temporary partial incapacity and at same time recover for permanent partial loss of use of member where partial incapacity arises out of injuries other than those which cause partial loss—where there was no evidence that temporary partial loss of capacity for work was due to other injury than one for which compensation was allowed for permanent partial loss of use awards under both were double compensation which was not authorized. Slago Coal Co. v. Indus. Comm. (Ill.) 292

Employee who lost finger and received compensation fixed by act for such loss is not entitled to compensation for temporary total disability under other section. Hardin v. Higgins Oil & Fuel Co. (La.) 446

Where original award, in addition to full compensation authorized for loss of toes, which was in lieu of all other compensation for consequence of that loss, awarded further compensation for period equal to that allowed for loss of foot, it was not proper to make supplemental award for subsequent amputation of the foot —— award for loss of foot includes compensation for incapacity following amputation. Bowne v. Stamford Rolling Mills Co. (Conn.) 515

Award of treble damages to minor under act should not be set aside because of false representations as to age. Mueller & Son Co. v. Gothard (Wis.) 730

§ 388. PERSONS ENTITLED TO COMPENSATION FOR DEATH OF EMPLOYEE (DEPENDENTS)

Dependency shall be determined as of time of accident. State Indus. Comm. v. Downer Steel Co. (New York) 75

Father and mother of deceased employee held not both entitled to compensation as dependents. Intini v. Stittville Canning Co. (N. Y.) 83

Widow of deceased employe is conclusively presumed to be dependent—Where she continued to reside in another state in home provided and paid for by decedent and where he continuously visited her at intervals, contributed to her support, wrote often professing love and affection and proffering continued support, they were not living separate and apart, nor had he abandoned her nor failed to contribute to her support, so as to deprive her of right of recovery—nor will fact that decedent may have contracted bigamous marriage with another woman deprive lawful wife of benefits. Coletrane v. Ott. (W. Va.) 232

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Question of dependency is of fact rather than law and each case must rest on own facts.—Test of dependency is not whether family could support life without contributions of deceased but whether they depended on them as part of means of living. Southern Surety Co. v. Hibbs. (Tex.) 224
"Dependency", contemplates only dependency which must affirmatively appear in record as fact—Actual dependency includes partial support as well as sole and exclusive support where partial support was necessary to provide claimant with some of ordinary necessities and of life suitable for persons in her class and position—dependency of wife is not controlled wholly by legal obligation springing from marriage but it is one of elements to be considered in determining dependency — Where wife was living apart from husband with his consent and engaging in gainful occupation but they corresponded regularly and he frequently visited her and contributed to her support he was dependent within act. —Receipt by wife of money from husband for purpose of accumulating savings is not receipt of contributions for support and does not establish dependency, but mere fact that she had small sum in bank does not raise conclusive presumption that money contributed by him was for purpose of such saving. Morris v. Yough Coal & Supply Co. (Pa.) 210
Only "dependents on earnings" of deceased employe are entitled to award under act. Biozina v. Castile Mining Co. (Mich.) 327
Injured employe's lump sum settlement for smaller amount than that awarded by arbitrator made without petition therefor or approval thereof by commission is void — Employer cannot relieve himself of liability under act by contract with employe — Employer liable for compensation is entitled to credit for payments of installments as they accrued up to time of final determination by commission but not to credit for payments beyond such amount under illegal lump sum settlement. International Coal & Mining Co. v. Indus. Comm. (Ill.) 278
Father of seven children held not partially dependent on son who contributed some of earnings where father earned $18 a week of which sum he gave his wife $10 — Partial dependency may exist though evidence shows claimant could have subsisted without contributions of deceased and it is not necessary to show that claimant would have been without necessaries of life or other means of support, as test is whether contributions were relied on, existence of dependency being largely one of fact. Henry Pratt Co. v. Indus. Comm. (Ill.) 296
Dependent is one sustained by or relying for support on aid of another — Where son managed mother's business, not for pay, not contributing to her support, fact that she wrote him to come to another state to work for her to help her, and was killed before he went, did not show she was actually dependent on him at time of injury. Alden Coal Co. v. Indus. Comm. (Ill.) 274
"Child or children" refers only to legitimate child or children — illegitimate children of deceased employee, living with him and mistress, who had living husband undivorced, in one family and in fact dependent upon employee, held entitled to compensation though their mother was not. Gritta's Case, In re J. M. Hartwell & D. Knowlton. In re Federal Mut. Liab. Ins. Co. (Mass.) 319
Mother receiving $5 a week for boarding 17 year old son who earned $9 a week and was given money for clothes and amusements by father earning $30 a week, held not dependent on son to entitle her to compensation for his death. Jedrlinich v. James Shewan & Sons, Inc. (N. Y.) 480
Test of dependency is whether contributions were relied upon by dependent for means of living —— mere fact that mother used son's earnings in support of family does not prove she relied upon them so as to constitute her "dependent" —— No one is "dependent" who has sufficient meas to supply present necessaries accoding to class and position in life. McDonald v. Great Atlantic & Pacific Tea Co. (Conn.) 525
Upon death of beneficiary to whom award has been made pursuant to provisions, accruing and payable in periodic installments, lawful representative of estate may claim and receive such portion thereof as had accrued and remained unpaid at date of beneficiary's death—estate of deceased nonresident alien bneficiary, awarded compensation, may be represented by consul in collection. Poccardi, Royal Consul, v. Ott, State Comp. Comm. (W. Va.) 731
Where minor son enlisted for four years so that his maturity would be reached before expiration, emancipation from parental control was voluntary act of self and father, ending father's obligation to support son and son's right to compensation for father's death. Iroquois Iron Co. v. Indus. Comm. (Ill.) 646

§ 389. SUBROGATION TO RIGHTS OF INJURED EMPLOYEE.

Employer, on payment of compensation awarded widow of deceased servant, is entitled to recover over against third person negligently causing injury. Golden & Roter Trans. Co. v. Brown & Sehler Co. (Mich.) 58
Negligent third party cannot without consent or concurrence of employer, by settlement with injured employe, effect or preclude right of recovery of employer for damages sustained by injured workman to extent of compensation awarded. Hugh Murphy Const. Co. v. Serck. (Neb.) 194

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As act subrogates employer to any rights employe has against persons whose negligence causes injury, such third person's claimed right of subrogation to rights of employe with whom it settled could not benefit it in suit against employer on alleged agreement of indemnity. McClintic-Marshall Co. v. O'Leary. (La.) 179
Where employer, having paid statutory compensation to employee, injured by negligence of another, sues such third party, amount recoverable is not limited to amount paid as compensation but all that is recovered above amount paid as compensation is for benefit of injured employee —where employee, injured by third party, received from it in compromise of action, sum in excess of compensation recoverable under act, his employer, in consenting to settlement, could not recover from such third party cost of medical services rendered to employee and paid by employer. Louis Bossert & Sons, Inc. v. Piel Bros., Inc. (N. Y.) 372
Where deceased left widow and two sons but only widow claimed and received compensation from insurer, insurer nevertheless was subrogated to right to recover damages to sons as well. Mass. Bonding & Ins. Co. v. Los Angeles R. Corp. (Calif.) 253
Compensated Federal employee can receive no personal benefit from recovery against another who caused injury. Hine, Dir. Gen. of R. R. v. Dahn (U. S.) 607

§ 390. PAYMENT OF COMPENSATION

§ 391. —— PERSONS LIABLE.

§ 391¼. ——

Installments payable in the future do not bear interest. State ex rel. Johnson Hardware Co. v. Dist. Court of Carver County (Minn.) 189

§ 391½. —— PENALTY FOR DEFAULT OR DELAY.

Fact that policies of accident insurance were issued under act does not affect statutory provision of 12% damages for failure to pay promptly. Southern Surety Co. v. Nelson (Tex.) 508
Where statute allows employee to recover attorney's fees in case order for compensation is made in his favor and in event employer appeals but fails to reduce award, held that court has no authority to allow such fees where employee himself appeals nor where employer offers to pay. Updike Grain Co. v. Swanson. (Neb.) 469

§ 392. —— AUDIT OF CLAIMS INCURRED OR PAID BY BOARDS OR COMMISSIONS.

§ 393. —— TERMINATION OF PAYMENTS.

Where dependent widow, awarded compensation, remarries when "without dependent children", because child dependent at time of husband's death has died, her compensation ceases. Giggndelle v. Piedmont & Georges Creek Coal Co. (Md.) 535
Heirs of deceased employee, already compensated for injuries, have no right to compensation for death of employee not due to such injuries, before term of compensation had expired. U. S. Fidelity & Guar. Co. v. Salser (Tex.) 716

§ 393¾. —— PRIORITIES.

§ 393½. —— MEDICAL ATTENDANCE AND SERVICES.

Company which knowingly permitted employes to be moved to hospital without objection, performed legal duty and rendered itself liable to hospital—Act renders company liable for such services though act also requires hospital to furnish free services to miners. Trustees State Hosp. Middle Coal Field of Pa. v. Lehigh Valley Coal Co. (Pa.) 214
Injured employee cannot sue employer for medical expenses nor can doctor rendering services to such employee sue his employer therefor. Louis Bossert & Sons, Inc. v. Piel Bros. Inc. (N. Y.) 372
Employer may contract to pay compensation in excess of statutory obligation for treating injured employee. Collins v. Joyce. (Minn.) 463

(C) PROCEEDINGS.

§ 394. NATURE AND FORM OF REMEDY.

Action for death of employee which occurred after amendment of act is not maintainable unless proceedings have been prosecuted to decision in first instance before board. Georgia Casualty Co. v. Ward. (Texas) 103
Proceedings brought by insured for services before commission cannot be held to be situation contemplated by statute relating to action to be dismissed where plaintiff has mistaken remedy. Brunette v. Brunette. (Wis.) .. 236
Where complaint alleged that defendant assumed and agreed to pay liabilities of insurance company which insured plaintiff's employer, and that such company was indebted to plaintiff on ground of personal injury in such employment, held that complaint failed to state cause of action within grounds of jurisdiction. Burns v. Millers' Mut. Casualty Co. (Minn.) 461

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§ 394½. ABATEMENT OR SURVIVAL.

§ 395. WHAT LAW GOVERNS.

Employee working as lineman on interstate railroad anchor bridge was employed on instrumentality of interstate commerce and liability for death depends on federal law so that employe's contributory negligence does not bar recovery. Baker v. New York, N. H. & H. R. Co. (New York) 76

Where petition of railroad laborer in one count relied on Federal act and in another count on common-law liability and railroad denied liability under each count, fact that it requested instruction that it was not liable at common law will not preclude it from taking judgment after trial on theory that federal act applied where it also requested instruction that it was not liable under such act. Williams v. Schaff. (Mo.) 346

Federal court has jurisdiction to enforce maritime right. Berg v. Philadelphia & R. Ry. Co. (U. S.) 621

§ 396. JURISDICTION OF COURTS.

Where complaint alleged that defendant assumed and agreed to pay liabilities of insurance company which insured plaintiff's employer, and that such company was indebted to plaintiff on ground of personal injury in such employment, held that complaint failed to state cause of action within gronuds of jurisdiction. Burns v. Millers' Mut. Casualty Co. (Minn.) 461

Where beneficiaries of deceased filed claim with board before they filed suit against insurers, but no notice was issued by board to insurers to answer claim and no action taken by board in adjudicating it, it cannot be held that jurisdiction of court to adjudicate matter could not attach until formal notice had been given by beneficiaries to board that they would not abide its decision. Southern Surety Co. v. Nelson (Tex.) 503

Federal court has jurisdiction to enforce maritime right. Berg v. Philadelphia & R. Ry. Co. (U. S.) 621

§ 397. BOARDS AND COMMISSIONS.

Commission is administrative body, not court, having no power other than those granted by statutes of its creation. Brunette v. Brunette (Wis.) 236

Commissioner who has made award for loss of right leg and injury to left for further consideration may designate other commissioner to hear proceedings relative to modification of original award. Saddlemire v. American Bridge Co. (Conn.) 130

Commission has power to promulgate rules and regulations to protect injured employee, employer, and insurance carrier, and to safeguard state fund, provided such rules are reasonable and conform to spirit of act —— rule requiring injured employee to procure commission's consent to leaving locality of employment and providing forfeiture of compensation accuring after such departure, without hearing and regardless of whether absence affected disability, is unreasonable —— injured employee, making application for compensation, is bound to take notice of rules and regulations of commission affecting application. Varoukas v. Indus. Comm. of Utah. (Utah.) 598

§ 397½. REPORTS OF ACCIDENT.

§ 398. NOTICE OF INJURY OR CLAIM, AND DEMAND FOR COMPENSATION.

Though failure to give notice required by act may deprive Commission of jurisdiction, such failure does not give court jurisdiction of action for damages. Dominguez v. Pendola. (Cal.) 2

Prosecution of suit for employee's death held not claim for compensation within act, requiring it be made within six months after injury or death —Insurer's attorneys by advising plaintiff's attorneys that matter had been referred to them, that attorneys for plaintiff should have claim for compensation filled out, and that insurer was investigating plaintiff's claim and would advise plaintiffs when completed, did not waive making claim within six months after death as required. Georgia Casualty Co. v. Ward. (Texas) 108

Where injured employee made no claim within time limit of act except in conversation with employer's physician, such conversation did not constitute claim — employer who furnished injured employee with medical attention and gave him light work as soon as he was able to do anything, at same wages as before, was not thereby estopped from urging employe's failure to make timely claim. Stein v. Packard Motor Car Co. (Mich.) 333

That employer's bookkeeper had actual knowledge of employee's injury did not dispense with necessity of giving employer written notice required by act. Indian Creek Coal & Mining Co. v. Beach. (Ind.) 312

Notice of injuries to employer within 30 days and claim for compensation within 6 months are jurisdictional and award of compensation cannot be sustained in absence of evidence of compliance with such requirement

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— where payments were not made by employer under act but voluntarily without reference to it, widow is not entitled to maintain proceeding for compensation on theory of waiver of notice and written claim — where employee was injured and returned to work for a time, widow was not entitled to 18 months from time of returning to work in which to file notice of claim. Ohio Oil Co. v. Indus. Comm. (Ill.) 284
Where claim by mother of deceased employee, with no indorsements indicating date of filing, was dated within one year of accident and joint claim by mother and brother was dated more than one year after accident it will be presumed that mother's claim was filed in time though brother's claim is too late Hanson v. Flinn-O'Rourke Co. Inc. (N. Y. S.) 476
Where servant died as result of accident which befell him more than year previous to death, act does not give right to action to survivors. Monvoisin v. Plant. (La.) 448
Held that corporate employer, though its superintendent, had knowledge of accident on day following to constitute notice within act. Insana v. Nordenholt Corp. (N. Y.) 478

§ 398½. ARBITRATION.

Fact that arbitrator acted as attorney for claimant several weeks after arbitration had ended did not render arbitrator ineligible. Dewey v. Dewey Fuel Co. (Mich.) 330

§ 399. MEDICAL EXAMINATION OF CLAIMANT.

Commission held to have erred in awarding compensation without requiring injured employe to submit to physical examination. Hafer Washed Coal Co. v. Indus. Comm. (Ill.) 292

§ 400. PARTIES.

Either administrator, beneficiary, or employer may file petition for adjustment of claim under act. Nat'l Zinc Co. v. Ind. Comm. (Ill.) 21

§ 401. PLEADING.

Plaintiffs must allege that claim was made within six months after injury or death. Georgia Casualty Co. v. Ward. (Texas) 108
Declaration in case for negligence to recover for injuries received while in defendant's employ may be amended to allege that defendant was within act and had not accepted provisions thereof. Watts v. Derry Shoe Co. (N. H.) 71
Declaration for injuries of city employe against street railroad, states common law action, not action under act. O'Brien v. Chicago City Ry. Co. (Ill.) 144
In action by servant for personal injuries on declaration stating cause of action at common law, it was incumbent upon plaintiff to prove that he was in exercise of due care at time of injury, although defendant admitted he employed more than five workmen and was not "assenting employer". Nicholas v. Folsom. (Me.) 182
Defense that plaintiff had not paid compensation by employer must be specially pleaded in employee's personal injury action against third person. McHugh v. Williams & Payton (R. I.) 506
Answer seeking to bring employee within act, which fails to allege that employee was one of four or more parties regularly employed, is demurrable — complaint for personal injuries to employee which does not allege facts bringing plaintiff within act need not allege employer's failure to secure payment of compensation. Michel v. American Cinema Corp. (N. Y.) 375
Plaintiff must aver and prove that there was agreement in writing or written notice given prior to accident that employee's contract of hiring was not made subject to act. McNutt v. Adams Express Co. (N. J.) .. 552

§ 402. EVIDENCE.

§ 403. —— PRESUMPTIONS AND BURDEN OF PROOF.

Cause of accident cannot be presumed but must be established. Minerly v. Kingsbury Const. Co. (N. Y.) 33
Whoever files petition under act, existence of beneficiary at time of hearing is essential to award and must be affirmatively shown.—Though deceased employee's father and mother were seen at their residence in Russian Poland in August, 1915, presumption of continuance of life is insufficient for necessary showing of existence of beneficiaries at time of hearing 26 months later, country in meantime having been over-run by hostile armies and devastated. Nat'l Zinc v. Ind. Comm. (Ill.) .. 21
Where railroad foreman was killed by car of his employer, standing on side track in lumber yard, waiting for his men to arrive so he could direct them, and no connection of deceased with interstate commerce was shown award under act will not be disturbed. Saccomano v. Grasse River R. Corp. (N. Y.) 205
Railroad resisting payment of compensation for death of employe on ground he was employed in interstate commerce has burden of proving such fact. Smith v. Philadelphia & R. Ry. Co. (Pa.) 213

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Applicant has burden of furnishing evidence from which inference can be legitimately drawn that accident arose out of and in the course of employment. Thier v. Widdifield. (Mich.) 339
Where employee's body was found on pavement under window of mill where he worked, and there was no evidence of suicide or murder, presumption against commission of crime is sufficient to support evidence that death resulted from accident — burden is on claimant to show that death was caused by accidental injury arising out of employment. Sparks Milling Co. v. Indus. Comm. (Ill.) 299
Where intoxication of employee is pleaded as defense, defendant has burdent of affirmatively establishing such intoxication. Hartford Acc. & Indem. Co. v. Durham. (Tex.) 395
Where claimant dependent on deceased son, received support from son's earnings or rent of son's house it is fair inference that expenses of house paid by son were paid with rent. Biozina v. Castile Mining Co. (Mich.) 327
One claiming compensation has burden of proving statutory essentials of case and must establish that injuries arose out of employment — where minor girl was accustomed to take elevator in coming to and from work, or in course of work, and was so killed, finding she was engaged in duties of employment held not unreasonable inference — There is natural presumption that one charged with performance of duty found injured at place where duty may have required him to be is injured in course of and as consequence of employment. Saunders v. New England Collapsible Tube Co. (Conn.) 271
Where railroad's servant was injured in course of employment burden is on railroad to show case is controlled by federal act making negligence the test of liability. Knorr v. Central R. R. of N. J. (Pa.) 497
Wife living with husband and claiming compensation for death of son will be presumed supported by husband and to rely upon him alone. McDonald v. Great Atlantic & Pacific Tea Co. (Conn.) 525
Injured employee, entitled to compensation, who has left locality of employment without commission's consent, in violation of its rules, has burden of showing he had good cause for failure to procure consent and that absence has not prejudiced employer, insurance carrier or state fund, and did not prolong period of disability. Varoukas v. Indus. Comm. of Utah. (Utah) 598
Burden is upon injured employee to show that illness resulted from exceptional exposure. Engels Copper Mining Co. v. Indus. Acc. Comm. (Cal). 624
Presumption is that deceased was in performance of duty to close windows when killed by collapse of building from tornado. Reid v. Automatic Elec. Washer Co. (Iowa.) 662
Where employer has rejected act, and employee is injured, there is presumption that injury was proximately caused by employer's negligence. Mitchell v. Mystic Coal Co (Iowa.) 657

§ 404. —— ADMISSIBILITY.

Rule that dying declarations are admissible in civil cases as followed and applied in compensation case. Vassar v. Swift & Co. (Kan.) 166
In issue as to percentage of loss of use of employe's injured member it is competent to prove conditions such as comparative ability to do certain things in use of injured member before and after accident. International Coal & Mining Co. v. Indus. Comm. (Ill.) 278
Hearsay statements in report of commission to make investigation are not competent evidence. Biozina v. Castile Mining Co. (Mich.) 327
Affidavit of fellow employee, in army at time of trial, that deceased employee was attempting to close windows, part of duty at time of accident, should have been considered as evidence. Reid v. Automatic Elec. Washer Co. (Iowa) 662

§ 405. —— WEIGHT AND SUFFICIENCY.

(1). In general.

Finding of commission in favor of claimant as to cause of injury to workman, must rest on legal foundation, not on presumption. Nestor v. Pabst Brewing Co. (N. Y.) 85
In action by compensation insurer, evidence held to show conclusively that deceased employe was guilty of contributory negligence in stepping into elevator shaft. Globe Indem. Co. v. Hook (Cal.) 127
Evidence of employer as to acceptance of counter offer of indemnity company on receiving application stating minimum premium held not sufficient upon which to base finding that employer accepted offer prior to accident — Evidence held insufficient to support finding that local agent of company had authority to bind company by parol from application — Finding that it was custom and practice that employer was covered from date of application where terms were not unconditionally accepted by company held not supported by evidence. Western Indem. Co. v. Indus. Acc. Comm. (Calif.) 256
Claimant has burden of proof that injury was accidental but proof may be direct or circumstantial. Steel Sales Corp. v. Indus. Comm. (Ill.) .. 303

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Commission is not justified in finding for one party to proceeding because there is some evidence which would justify finding nor should it base finding on testimony which facts and circumstances show to be untrue. Hafer Washed Coal Co. v. Indus. Comm. (Ill.) 298

(2). Relation of parties.

Evidence held not sufficient to establish that plaintiff when injured was employed by subcontractor and that he was entitled to recovery. Spencer v. Marshall (Kan.) 529

Evidence held to show that defendants were operating drilling-machinery on which plaintiff was injured —— there was not sufficient evidence to show that plaintiff was subcontractor. Spencer v. Marshall (Kan.) 529

(3). Acceptance or rejection of statute.

Held that there was no evidence from which agreement to pay compensation for injury within one year after accident could be inferred. Randolph v. Hammersley Mfg. Co. (N. J.) 555

(4). Injury arising out of and in course of employment.

Finding of commission that deceased employee, who never resumed work after injury and died after fall in street, died as result of valvular heart disease aggravated by previous injury, held not warranted. Nester v. Pabst Brewing Co. (N. Y.) 85

Finding of commission that certain accident was caused by "encephalitis", necessarily involving finding that claimant suffered fractured skull, was not sustained where there was no evidence that the disease was caused by fractured skull. Donovan v. Alliance Elec. Co. (N. Y.) 77

Finding by board that death resulting from carcinoma had been hastened by accident held warranted. Whittle v. Nat'l Aniline & Chem. Co. (Penn.) 108

Evidence held to sustain finding of board that death of engineer killed in falling from train carrying employees from mine where he was employed occurred by reason of special hazards incident to his work, arising out of employment. Indian Creek Coal & Mining Co. v. Wehr. (Ind.) 81

Evidence held to sustain commission's award for partial loss of use of employee's hand, based on evidence that infection causing loss resulted in course of employment and not from employee's act in scraping callous from hand with knife. Challenge Co. v. Ind. Com. (Ill.) 14

Where carpenter bruised hand in using screwdriver, resulting in felon, injury cannot be deemed caused by "accident" evidence held insufficient to show that felon resulted from pressing of screwdriver with palm of hand. Woodruff v. R. H. Howes Const. Co. (N. Y.) 72

Compensation was properly awarded for death of employee of printing establishment, found on concrete floor with fractured skull between two rolls of paper where there were also other obstructions in dark room. Graffe v. Art Color Printing Co. (N. Y.) 81

Award by commission made by theory that servant died as result of carbon monoxide poison incurred during employment, held supported by substantial evidence. Amalgamated Sugar Co. v. Indus. Comm. of Utah. 112

Evidence held sufficient to support jury finding that hernia for which compensation was granted did not exist in any degree prior to injury, though it was undisputed that employee had another hernia prior to injury. U. S. Fidelity & Guar. Co. v. Ross (Tex.) 219

Evidence held insufficient to sustain finding that pain to which employee was subject had been reasonably necessary result of employment—Nor that employe had neurosis or any disease. Pimental's Case. (Mass.) .. 185

Evidence discloses no facts which will justify inference that "Hodgkin's disease" resulted from ulcers in nose or that they were caused by inhaling fumes of acid used in occupation. State ex rel. Johnson Hardware Co. v. District Court of Carver County. (Minn.) 189

Evidence that lightning struck employer's house and that employee was killed while standing near electric light wire in barn which was not struck, held insufficient to warrant finding that death was from injury arising out of employment. Thier v. Widdifield. (Mich.) 389

Claimant may show that death was caused by accidental injury arising out of employment by circumstantial as well as direct evidence but award cannot be based on surmise or conjecture — where employee's body was found on pavement under window of mill where he worked, evidence held sufficient that death arose out of employment. Sparks Milling Co. v. Industrial Comm. (Ill.) 299

In proceeding for death of employee struck by lightning after having left road on which he worked evidence held to justify finding that he was seeking shelter from storm when killed. State Road Comm. v. Indus. Comm. of Utah. (Utah.) 404

Evidence that employee's sight began to fail shortly after injury to one eye and that in seven months he lost sight of both eyes with expert testimony that condition may have resulted from injury, held sufficient to support finding that blindness was due to injury. Indiana Power & Water Co. v. Miller. (Ind.) 316

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Award for injury to eyesight of employee burned in course of duties held warranted though oculists testified that defective eyesight was from other causes, there being testimony that he previously had no ocular defect. Raina v. Standard Gaslight Co. of City of N. Y. (N. Y.) 490
Evidence held to sustain conclusion of commission that employee contracted influenza in course of employment. City & County of San Francisco v. Indus. Acc. Comm. (Calif.) 428
Finding that disease was accelerated by accident held legitimate inference from evidence. Finkleday v. Henry Heide, Inc. (N. Y.) 566
In proceeding for death of servant from peritonitis following operation, finding that death resulted from accidental injury in course of employment held not sustained by evidence. Hoffman v. Pierce Arrow Motor Car Co. (N Y.) 569
Evidence held to warrant finding that cerebral hemorrhage was result of accident. St. Clair v. A. H. Meyer Music House (Mich.) 540
Findings of trial court in action under act held sustained by sufficient evidence. State ex rel. George D. Taylor & Sons v. District Court of Ramsey County (Minn.) 698
Where employee, whose duties required him to visit local agents or dealers in state, was killed when sheriff's posse attempted to stop automobile in which he was riding, held that findings that injury was accidental and arose out of and in the course of employment are sustained by evidence—evidence does not call for finding that employee was injured by act of third person or fellow employee so as to be excluded from compensation. Wold v. Chevrolet Motor Co. (Minn.) 699
Evidence held to sustain finding that deceased accidentally drowned himself while engaged in duties in course of employment. Kropf v. Mich. Beam Co. (Mich.) 686
Evidence that employee contracted incapacitating disease while working under direction of superintendent, held sufficient to sustain award. Engels Copper Mining Co. v. Indus. Acc. Comm. (Cal.) 624
Evidence held to justify finding in employee's favor. Hackley-Phelps-Bonnell Co. v. Indus. Comm. (Wis.) 724
Evidence held sufficient to show that servant was in part of building, where killed, pursuant to duty and was killed in employment. Reid v. Automatic Elec. Washer Co. (Iowa) 662

(5). Dependents.

Evidence held insufficient to sustain finding that claimant made average weekly wage of $28.34 when her regular wages were $2.50 per day. Vaughn v. Barnet Leather Co. (N. Y.) 90
Proof that deceased employee, nineteen year old farmer boy who was parents' chief help on rented farm, sought temporary employment to obtain money with intent to return to assist parents who were poor and failing in health and strength, held to justify finding that they were dependent. Southern Surety Co. v. Hibbs. (Tex.) 224
Evidence held to show actual dependency on son—where persons of limited means, otherwise entitled to compensation, actually received contributions for support from wages, facts constitute evidence strongly tending to establish dependency. Day v. Sioux Falls Fruit Co. (S. D.) 316
Held where decedent gave mother practically all wages, yet as father was in good health and followed occupation and sister, earning $120 a month contributed nothing to support of parents, finding that parents were not dependent was warranted. Rudnick v. White Bros. (Del.) 188
Fact that relator was voluntarily living apart from husband removed presumption of dependency and evidence shows no actual dependency within act. Kile v. District Court, Hennepin Co. (Minn.) 344
Testimony as to dependency sufficient to make applicable statutory presumption, in connection with documentary hearsay evidence, will sustain finding. Hanson v. Flinn-O'Rourke Co., Inc. (N. Y.) 476
Findings held to establish partial dependency of father and mother of deceased. Geo. A. Lowe Co v. Indus. Comm. of Utah. (Utah.) 511
Evidence held to establish that aged mother in poor circumstances, residing in Italy, whose children lived in this country and to whom deceased had been sending periodical sums for her support, was entitled to compensation as dependent. Venuto v. Carter Lake Club. (Neb.) 594
Evidence held insufficient to support finding of dependency on part of mother and infant brother of decedent who paid mother $15 per week. Foskett v. A. J. Buschmann Co. (N. Y.) 562
Evidence held to justify findings that at time of accident claimant widow was living apart from husband for justifiable cause, and was dependent within meaning of statute. Gates v. A. G. Dewey Co. (Vt.) 719

(6). Compensation.

Evidence held to sustain finding as to amount of daily earnings of others of same class as deceased employe doing same work during preceding year. Southern Surety Co. v. Hibbs. (Tex.) 224

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Where employee had received compensation while out of work because of injury and returned to work and had been thereafter discharged, evidence held to sustain finding that he had regained his capacity for work before being discharged. Bianchi v. Board of Com'rs of Port of New Orleans (La.) 317

In action for death of employee, held under facts that court properly awarded lump sum rather than weekly allowance. Hartford Acc. & Indem. Co. v. Durham. (Tex.) 395

Evidence held insufficient to prove employee was suffering permanent partial disability beyond loss of one finger, for which he received compensation, by reason of stiffness of two other fingers. Hardin v. Higgins Oil & Fuel Co. (La.) 446

Award for loss of 72% of use of hand because of loss of thumb and forefinger, based solely on table adopted by resolution of commission fixing percentage of loss of use of hand occasioned by specified injuries, must be set aside. Bubniak v. John K. Stewart & Sons (N. Y.) 577

§ 406. DEPOSITIONS.

§ 407. TRIAL OR HEARING BY COURT.

§ 408. —— IN GENERAL

§ 409. —— TIME AND PLACE OF HEARING.

§ 409½. —— QUESTIONS FOR JURY.

Evidence held sufficient to take to jury question of declarant's fear of impending death and question of credibility of declarations. Vassar v. Swift & Co. (Kan.) 166

Evidence held sufficient to take to jury contention that injury was result of blow. Stewart & Co v. Howell. (Md.) 453

§ 410. —— INSTRUCTIONS.

Where company became subrogated to rights of widow and heirs to recover against stranger for death of employee by paying compensation, and where only damage pleaded and supported by widow, instruction authorizing recovery to two sons as well, was erroneous. — Admission by defendant's counsel that right of widow and heirs to recovery vested in insurer who paid fees does not warrant charge authorizing insurer to recover damages to sons of deceased where it pleaded only damage to widow. Mass. Bonding & Ins. Co. v. Los Angeles R. Corp. (Calif.) .. 253

Requested instruction that jury has no right to find defendant employer guilty of negligence unless there is evidence to support it, nullifies statutory presumption against employer rejecting act. Mitchell v. Mystic Coal Co. (Iowa) 657

§ 410½. —— TRIAL OR HEARING BY COURT—VERDICT AND FINDINGS.

It is sufficient that employer, who has rejected act, sued for injury to employee, has not negatived or rebutted statutory presumption of negligence. Mitchll v. Mystic Coal Co. (Iowa) 657

§ 411. —— JUDGEMENT OR DECISION.

§ 411¼. ——— EXECUTION AND ENFORCEMENT OF JUDGMENT OR AWARD.

§ 411½. —— NEW TRIAL.

Where woman, alleged wife and dependent of deceased workman, recovered judgment against employer under act, subsequuently dying herself, and where judgment was revived in name of her administrator and where on new trial it was shown she was not wife of deceased, held judgment should have been set aside and new trial granted. Stokes v. Morris & Co. (Kan.) 444

§ 412. —— APPEAL OR OTHER PROCEEDING FOR REVIEW.

Court has power to reverse judgment in proper case if evidence shows inadequacy in amount of verdict, or to reverse judgment that appears excessive and grant new trial unless remittitur be filed in such sum as court may deem just. Brown v. York Water Co. (Neb.) 191

Where demand for compensation was not made in time required and no allegation of incapacity was made, yet where there was evidence of incapacity, judgment should not be reversed and cause dismissed on employer's appeal but case should be remanded to lower court. Georgia Casualty Co. v. Ward. (Tex.) 223

Where answer was general denial and at trial it was shown that no notice of accident was given to employer as required, and record failed to show that question was called to attention of court, held it is too late to raise question on appeal. Vassar v. Swift & Co. (Kan.) 166

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Only questions of law are reviewable by court in compensation cases — Whether evidence sustains finding of fact does not become question of law unless all reasonable and impartial minds would reach only one conclusion — finding that relator was voluntarily living apart from husband must stand. State ex rel. Kile v. District Court, Hennepin County. (Minn.) 344

§ 413. PROCEEDINGS BEFORE BOARDS OR COMMISSIONS.

(7). ——

Issue of dependency being one of fact, commission's conclusions will not be interfered with if supported by substantial evidence, and if commission erred in findings of fact and conclusions, court cannot correct error. McVicar v. Indus. Comm. of Utah. (Utah) 596

§ 414. —— IN GENERAL.

§ 415. —— RECEPTION OF EVIDENCE.

Claimant's counsel was entitled to rely on stipulation to take further testimony and was not required to make statement to commission of what he proposed to prove by witnesses he desired to produce. McVicar v. Indus. Comm. of Utah (Utah.) 596

§ 416. —— REPORT AND FINDINGS OR AWARD.

Courts cannot look for same precision in adjudications by board as otherwise might be insisted on if members were required to be learned in law. Whittle v. Nat'l Aniline & Chem. Co. (Penn.) 103

Since provisions of act as amended do not provide for notice to insurance carrier nor making it party to agreement for compensation, such agreement, approved by board, is binding upon parties until revoked though insurer had no actual notice of its execution or approval—insurer is party in interest entitled to all of employer's rights including that of appeal and on its request should be made party, and is then entitled to apply to vacate order approving agreement—while board has power in case of fraud, duress or mistake to vacate its approval, application therefor should not be to allow a party to make new and distinct cause—mere misconception on part of insurance carrier as to law is not of itself such mistake as will authorize setting aside of agreement approved by board. Frankfort Gen. Ins. Co. v. Conduitt. (Ind.) 25

Though not expressly authorized to correct its awards except as provided for purpose of readjusting compensation, board has inherent power to correct errors, inadvertences, and mistakes in entry of its awards; but such authority must be exercised in harmony with provisions of act giving courts jurisdiction to set aside awards. Blair v. Millers' Indem. Underwriters. (Texas) 105

Determination by referee that wife, ,though not living with husband at time of death, was actually dependent on him for support, was finding of fact and should have been so stated instead of stated as conclusion of law. Morris v. Yough Coal & Supply Co. (Pa.) 210

Commisioner need not include in present award injury whose extent or prognosis cannot be then determined.—Expression on belief by commissioner has no place in his finding and must be disregarded. Saddlemire v. American Bridge Co. (Conn.) 130

Right to sue under act is not dependent on notice of intent not to abide by award. Texas Employers' Ass'n. v. Roach. (Tex.) 400

Where there is no voluntary payment by employer, and commission must determine compensation for death of employee, it is its further duty to determine person entitled to same. Henry Pratt Co. v. Indus. Comm. (Ill.) 296

Claimants having established partial dependency, award based on average weekly wage of deceased was not invalid because commission failed to make finding as to amount of daily wage. Geo. A. Lowe Co. v. Indus. Comm. of Utah. (Utah.) 511

Where claim filed with commission by widow and report of accident filed by insured both stated that deceased was employed by insured, and where insurance carrier did not ask for hearing or appeal from award by commission but commenced payment of compensation, it could not thereafter obtain relief on ground that deceased was not employed by insured, in absence of allegations of fraud, intentional concealment or that it was prevented from obtaining knowledge of all facts. U. S. Fidelity & Guaranty Co. v. Taylor (Md.) 458

Commissioner who, supposing employee deprived of sight of right eye was not one-eyed man as was case, approved voluntary settlement on that basis, held empowered to reopen award on basis of total, permanent incapacity. Fair v. Hartford Rubber Works. (Conn.) 521

Findings and award under act need not recite details of procedure. Hackley-Phelps-Bonnell Co. v. Indus. Comm. (Wis.) 724

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Finding of commission, which fails to show employee's knowledge of injury, written notice, or excuse, is insufficient to sustain award—award cannot be sustained in absence of such knowledge or notice though evidence shows knowledge and excuse for failure to give written notice. Standard Cabinet Co. v. Landgrave (Ind.) 654

§ 417. —— PROCEEDINGS BEFORE BOARDS OR COMMISSIONS—REVIEW BY COURT IN GENERAL.

(1). Nature and form of remedy.

Where board's award, though erroneously entered against one who was not a party, was one that claimant did not wish to consent to his only remedy was to give notice of dissatisfaction and bring suit to set it aside. Blair v. Millers' Indem. Underwriters. (Texas) 105

Amendment of act to provide review of decisions of commission on certiorari or review in Supreme Court in first instance instead of district court held not to have affected cases pending and being prosecuted prior to time amendment became effective. Indus. Comm. v. Agee. (Utah) 114

Proceedings under act are purely statutory and appeal to court is in nature of certiorari Morris v. Yough Coal & Supply Co. (Penn.) 210

District courts being courts of original jurisdiction, it was with constitutional power of legislature to provide in act that trial of compensation cases in district court should be de novo but power giving court is that of review rather than trial anew. Willis v. Pilot Butte Mining Co. (Mont.) 355

(2). —— Certification of questions of laws.

(3). —— Certiorari.

In reviewing, on certiorari, award under act by commission, circuit courts exercise special jurisdiction, conferred by act and cannot maintain such proceeding by virtue of general powers—Only circuit court of county where someone of parties defendant shall be found has jurisdiction to issue such writ of certiorari and writ issued by court of county wherein none of parties defendant reside is in excess of jurisdiction. Central Illinois Public Service Co. v. Industrial Com. et al. (Ill.) 9

Though circuit court of county which issued such writ was without jurisdiction because none of parties defendant reside in county, court having issued writ may nevertheless transfer proceeding to court of county wherein someone of defendants reside and which has jurisdiction. Cent'l Ill. Pub. Serv. Co. v. Ind. Comm. (Ill.) 9

(3½). —— Injunction.

(3¼). —— Decisions reviewable.

Word "award" in act authorizes appeal within 30 days from date of award, does not limit writ of appeal to matter wherein compensation has been awarded or denied, and appeal lies from final order of board denying application by insurer to set aside approval of agreement. Frankfort Gen. Ins. Co. v. Conduitt. (Ind.) 25

(3⅝). —— Right of review.

(3½). —— Parties.

(3¾). Proceedings for appeal or other form of review.

(4). Presentation and reservations of grounds of review.

(4¾). Record.

(4½). Transfer of cause.

Transfer of controversy to court by bringing suit to set aside award does not affect board's right to correct clerical errors when such are manifest from record of proceedings in same manner as judicial tribunals by nunc pro tunc orders—Where claimant gave notice of refusal to accept award and brought suit to set it aside, notice was insufficient though board thereafter changed award to make it run against insurer who was party to proceeding instead of against stranger, since subsequent entry was merely to correct error. Blair v. Millers' Indem. Underwriters. (Texas) 105

Appeal entered thirty-one days after decision of Commission is too late and court obtains no jurisdiction. Holland Mfg. Co. v. Thomas. (Md.) 184

Suit for certiorari was begun by filing præcipe for writ — where employe filed in time such præcipe for scire facias court can thereafter issue alias writs to replace those lost before service on commission or employer. Oriental Laundry Co. v. Industrial Comm. (Ill.) 237

Reference in appeal to testimony taken by commissioner in proceedings, making transcript thereof part of appeal, does not bring transcript before court.—Finding for award under act is not reviewable in absence of transcript. Gates v. A. G. Dewey Co. (Vt.) 719

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Where, without direct authorization of Governor, Attorney General brought action in court to review award of commission, and Governor did not act to direct him to bring action until after period of time set by act from date of order or award, court was without jurisdiction of action, despite Governor's nunc pro tunc direction to Attorney General, and motion to dismiss should be granted. State v. Indus. Comm. (Wis.) 731
Notice of appeal from compensation award may be waived where petition for review is filed within time required by law. Mucha v. Morris & Co. (Neb.) 703
Petition for certiorari to review order of commission will be denied where petitioner includes privilege of filing reply to commission's answer showing that findings complained of are sufficiently supported by evidence. Wetern Indem. Co. v. Indus. Acc. Comm (Cal.)..... 645

(5). Trial or review.

Assignment of error on appeal from award by board that award is contrary to law is sufficient to present question of sufficiency of evidence. Kramer v. Huntington Steel Foundry Co. (Ind.) 154
Assignment of error that award was contrary to law presents question as to sufficiency of evidence. Alexander Box Co. v. Cutshall. (Ind.).....155
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Provision placing burden of proof on one appealing from decision of commission does not cast added burden on claimant who is denied compensation by it. Stewart & Co. v. Howell. (Md.) 452
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Party charging fraud in award in record on review by court under act has ample remedy by offering proof of such charges, and may also show, if such be fact, that document in record purporting to be finding and award of commission was not in fact its act.—In action to set aside award, award will be presumed to have been regularly made. Hackley-Phelps-Bonnell Co. v. Indus. Comm. (Wis.)..... 724
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(6). —— Questions of law.

Finding of commission that engine on which employee was killed was not engaged in interstate commerce at time, held conclusion of law presenting reviewable question on jurisdiction. Hines v. Indus. Acc. Comm. (Cal.) 628
Legal conclusions of commission may be reviewed. Reid v. Automatic Elec. Washer Co. (Iowa) 662

(7). —— Quetions of fact.

Finding of commission must be sustained by courts where supported by substantial evidence. Amalgam. Sugar Co v. Indus. Comm. of Utah. (Utah) 112
Finding of referee, approved by board, that claimant's husband while in defendant's employ received injuries by accident which caused his death, is conclusive. Ferri v. Lenni Quarry Co. (Penn.) 98
Extent of permanency of disability is question of fact and when supported by evidence, finding of board that hand had not been rendered permanently incapable of use is conclusive, and warrants ruling that compensation for total incapacity should cease. Barry's Case. (Mass.) 57
Where evidence tends to support finding of board its award will not be disturbed on appeal. Kramer v. Huntington Steel Foundry Co. (Ind.) 154
Award by board will be treated as having same force as verdict and will not be disturbed if supported by evidence. Rudnick v. White Bros. (Del.)..138
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Finding of board that death was result of accident arising out of employment will not be disturbed where there is evidence to support it. Board of Com'rs of Greene County v. Shertzer. (Ind.) 310
Whether or not death was result of accident arising out of employment was question of fact for board. Miller v. Bell. (Ind.) 315
While board will not be reversed for admission of hearsay evidence if there is any proper evidence to support finding where there is only incompetent hearsay evidence finding must be held unsupported. Biozina v. Castile Mining Co. (Mich.) 327
Whether mother who received $10 a week from husband was partially dependent on son held question of fact. Henry Pratt Co. v. Indus. Comm. (Ill.) 296
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Where there was evidence from which it could be inferred that accident so reduced employe's vitality that he succumbed to illness causing death, court on certiorari will not disturb board's finding that death resulted from accident. Tanner v. Aluminum Castings Co. (Mich.) 337
Question of dependency is one of fact and court will not interfere with decision of commission if there is evidence tending to sustain it. Alden Coal Co. v. Indus. Comm. (Ill.) 274
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Whether fall or acute cardiac dilation caused death held question for commission. Insana v. Nordenholt Corp. (N. Y.) 478
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Where amount of compensation awarded by commission is sustained by substantial evidence it is not province of reviewing court to disturb it. Geo. A. Lowe Co. v. Indus. Comm. of Utah (Utah) 511
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Board is trier of facts and where there is evidence supporting finding it will not be disturbed. St. Clair v. A. H. Meyer Music House. (Mich.) 540
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Court cannot disturb award of commission unless based on unreasonable conclusion from evidence. Engels Copper Mining Co. v. Indus. Acc. Comm. (Cal.) 624

(8). —— Harmless error.

Findings and award of arbitrators and industrial commissioner should not be reversed for failure to observe formal rules of evidence applicable to trials before law courts unless it clearly appears appellant has been prejudiced in some substantial right. Day v. Sioux Falls Fruit Co. (S. D.) .. 216
Basis of computation for employe working six days a week at $4.00 a day was $24 so that employer and insurer could not complain of computation on basis of 300 working days a year which made weekly wages less than $24. Uintah Power & Light Co. v. Indus. Comm. of Utah. (Utah) 329

(9). Determination and disposition of cause.

Under provision authorizing court to remand cause to commission for further proceeding, stating the question required further hearing, it should on application do so, there being merely insufficiency of proof as to existence of alleged beneficiaries. Nat'l Zinc. Co. v. Ind. Comm. (Ill.) .. 21

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When common pleas sustains exception to award of board and reverses its action it must remit record to board for further hearing, when, if further evidence produced is merely cumulative, it is duty of board to disallow claim. Kuca v. Lehigh Valley Coal Co. (Pa.) 499

§ 418. —— REVIEW OF JUDGMENT OF COURT ENTERED ON AWARD OF BOARD OR COMMISSION.

(1). Nature and form of remedy.

Act is unconstitutional in so far as attempting to confer on supreme court jurisdiction to try case anew on appeal from district court as though matter was originally before it. Willis v. Pilot Butte Mining Co. (Mont.) 355

(2). Decisions reviewable.

(3). Presentation and reservation of grounds of review.

(3½). Transfer of cause.

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(4). Record.

(5). Review.

Assignment of error in compensation case that erred in entering judgment affirming decision of commissioner standing alone, is unavailing for any purposes as not pointing out wherein or of what alleged error consists. Day v. Sioux Falls Fruit Co. (S. D.) 216

In action for death of employee, defendant could not complain of court's failure to calculate compensation due exactly by statute where amount alleged was less than it would have been had statute been strictly followed. Hartford Acc. & Indem. Co. v. Durham (Tex.)..... 395

Revisory powers of supreme court are limited in such consideration on record as will enable it to sustain where there is evidence to support board's findings and if on such findings the law has been properly applied. Kuca v. Lehigh Valley Coal Co. (Pa.) 499

(6). —— Questions of law or fact.

Finding by board of dependency if based on any evidence or inference fairly deducible therefrom will be sustained though court might differ from conclusion. Morris v. Yough Coal & Supply Co. (Pa.).....210

On appeal from judgment sustaining award of board, court will examine evidence and reasons stated in adjudication of referee and board as well as those on which opinion of later court is based. Morris v. Yough Coal & Supply Co. (Pa.) 210

Finding of commission that mother of son, killed in employment, was partially dependent on him, will not be disturbed on writ of error of court, confirming award of commission. Henry Pratt Co. v. Indus. Comm. (Ill.).. 296

Finding by board must stand unless wholly unsupported by evidence. Hogan's Case (Mass.) 331

If in opinion of commission there was sufficient evidence to justify award, court is not authorized to set it aside because it would have reached different conclusion, but finding based on mere conjecture cannot stand. Hafer Washed Coal Co. v. Indus. Comm. (Ill.)..... 293

Where there is evidence which warrants inference that injury arose in course of employment, court on writ of error to review commission's award cannot hold as matter of law that accident did not arise out of employment. Steel Sales Corp. v. Indus. Comm. (Ill.)..... 803

On appeal findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong. Amer. Smelting & Refining Co. v. Cassil (Neb.)..... 464

On appeal Supreme Court will not substitute its opinion on question of fact from reading of record for that of commission. Hackley-Phelps-Bonnell Co. v. Indus. Comm. (Wis.)..... 724

(7). Determination and disposition.

§ 419. PROCEEDINGS TO INCREASE, DIMINISH, OR TERMINATE COMPENSATION.

Award for temporary disability made and certified by court of appeal under act from decision of commission refusing compensation, should be treated as if rendered by commission for purpose of exercising continuing jurisdiction to determine claimant's right to further compensation, but for failure to exercise such jurisdiction, remedy is not by appeal in absence of statute giving it. Indus. Comm. v. Davidson (Ohio) 96

Commission may review any award and make award modifying previous award subject to maximum or minimum provided in act. Choctaw Portland Cement Co. v. Lamb. (Oka.) 207

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Where employe files application for compensation for injury to hand within year after injury but at time of application extent of injury was not appreciated his application for increased award on account of subsequent loss of use of arm growing out of injury was not barred although filed later than year after injury. Choctaw Portland Cement Co. v. Lamb (Okla.) 207

Modification of commissioner's award can be made only according to statute —Notice of hearing of modification of such re-award should approximate court order in form and definiteness.—Where record made clear that both employer and injured servant had full opportunity to present such issue of modification, and that it was fully heard and adjudicated without prejudice to rights of employer, he cannot complain that notice of hearing was not in proper form.—Award under act is creation of statute, subject to modification on grounds therein specified, and there is nothing about it which has finality of judgment.—Where commissioner made award for loss of right leg, in modification of award for injury to left leg for total incapacity, commissioner did not err in making award covering all injuries and deducting therefrom payment already made under former award. Saddlemire v. American Bridge Co (Conn.) 130

Petition by employer to be relieved from further payments of compensation held properly denied where employee, though not fully recovered worked about a week, had full wages, and then left. Nixon v. Furniture Mfrs' Ass'n (Mich.) 333

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Cessation of disability for which compensation is to be paid is open to inquiry even after final judgment. Pye v. Southwestern Gas & Electric Co. (La.) 450

Original award, though not subject to be set aside on appeal because not taken within time specified, can be considered to determine whether circumstances justify modification to meet changed conditions. Bowne v. Stamford Rolling Mills Co. (Conn.) 515

Employer cannot have agreement for death of employee terminated because of widow receiving money in settlement of claim against party causing death; rights of children, unless changed by death, being fixed by that agreement and unaffected by action of mother. Satterfield v. Wahlquist (Pa.) 579

Under provision authorizing correction during compensation period on showing change of conditions, mistake or fraud, it is only mistake of fact and not one of law which can be so corrected. U. S. Fidelity & Guar. Co. of Baltimore, Md. v. Davis. (Tex.) 594

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Commission has authority to fix fees of attorneys representing claimant—— In fixing fee jurisdiction is confined to determination of reasonableness of fee for service not to legality of contract for payment for services—— If claimant who has entered contract employing attorney seeks to avoid payment after services have been rendered, attorney is entitled to fair hearing on question. Schilling v. Indus. Acc Comm. of California (Cal.) 268

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